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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

EDITED BY

CHRISTOPHER ROBINSON, Q.C.

VOL. XXXVI.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 38 VICTORIA, TO EASTER TERM, 38 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES
OF THE
COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.
" " ROBERT ALEXANDER HARRISON, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General :

THE HONORABLE OLIVER MOWAT.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 38 VICTORIA, 1874.

November 16th, to December 5th.

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

WATEROUS ET AL. V. MONTGOMERY.

Promissory note—Stamps.

Where the holder of a note has reasonable notice of the want of proper stamps, he must repel the presumption of knowledge by reasonable evidence, or shew that as soon as he acquired knowledge he affixed double stamps, or that he made due enquiry and was thereby led to believe that the note had been duly stamped, or had not reason therefrom to believe that it had not been duly stamped; in either of which cases he may be justified in not attaching the double stamps until he has knowledge by and at the trial.

The notice to or knowledge of his attorney or agent must be considered his. Upon the evidence, set out in this case, it was *held* that the double stamps had not been put on in time.

COUNTY Court case.

Declaration: on a promissory note for \$100, dated 19th of May, 1871, made by defendant; and on the common counts.

Pleas, among others: that the note was not properly stamped.

Replication: that when the plaintiffs took the note they had no knowledge that the proper duty had not been paid, and as soon as they knew it they affixed double stamps.

Issue.

The cause was tried at the Fall Assizes for 1873, at Brantford, before Hagarty, C. J. C. P., with a jury.

It was shewn in evidence at the trial that at the time the note was made, and up to and including the 31st July, 1871, the note had not been stamped.

One H. C. Johnston, with whom the note was left for collection, wrote to the maker on the 31st of July, 1871, and called his attention to the fact that the note was not stamped, referring him to the penalty in such cases, and recommending the immediate payment of the note.

The note, with other notes, was left with the plaintiffs as collateral security for a loan of money in November, 1871. It was not clearly shewn whether there was a stamp on it then or not. There was a three cent stamp on the note defaced "May 19, 1871." One of the plaintiffs said he believed when he got it the note was stamped.

The clerk of the Division Court of the Second Division of the County of Ontario stated that the note was sent to him for collection by Mr. Miller, the plaintiff's attorney.

A summons was issued, dated 30th July, 1872. The note had then a three cent stamp on it.

A notice was given by the defendant that he disputed the plaintiffs' claim, on the ground that the note was not duly stamped, nor was the stamp cancelled according to law. He also denied the making of the note, and that the plaintiff was the legal holder thereof.

The Court, at which the trial was to be had, was to sit on the 3rd September, 1872. At that trial Mr. Miller attended on behalf of the plaintiff. The defendant was examined at the sitting of the Division Court, in September, and after his evidence was given the case was postponed.

On the trial of this cause the defendant said he could not say if he spoke of the stamps in the evidence given in the Division Court.

The clerk of the Court said something was said about stamps.

The case was postponed, at the instance of the plaintiffs, and at the next sitting of the Court, in November, no one appeared on behalf of the plaintiffs, and they were nonsuited.

After November, the clerk of the Division Court returned the note to the plaintiff Waterous, at his request, and there was then only a three cent stamp on it.

It did not appear from the evidence what time the note was returned by the clerk of the Division Court to the plaintiff, nor at what time the double stamps were put on,

The plaintiff *Waterous*, who was sworn, said that he believed it was on the advice of the solicitor of the plaintiffs in Brantford that they put on the double stamps in April, as soon as they received back the note they were put on. He said he did not know of the stamp defence until he learned it through Mr. A. Wilkes. He further said he did not know why the Division Court suit was postponed. He might find it if he looked up his correspondence; he knew very little of it from memory. He could not say how long they had it before the double stamps were put on. His impression was, it was when their solicitors in Brantford got it that the stamps were put on.

Mr. *Wilkes*, the solicitor, thought the letter sending for the note was written about the date of the cancellation, in April. He saw the double stamps put on.

The learned Chief Justice was against the plaintiffs' right to recover. He thought the plaintiffs had notice of there being a defence on the ground of deficiency of stamps or no stamps from the time of the first trial, if not from the communication by the clerk of the grounds of defence, (before the 3rd September, 1872.) They did not in fact, put on the stamps till April, 1873. They contended at the trial, that till they got back the note they thought in good faith the stamp was sufficient. At the trial, on one side it was contended that as soon as it was known such a defence was set up, the holders must attach the double stamps. On the other side, that the note being apparently

correctly stamped, it was only when the *fact* that it was not so stamped was proved the knowledge was gained, and the time arrived for affixing the double stamps. If the latter view be correct, then in the present case the learned Chief Justice failed to see how the plaintiffs could be said to have gained the knowledge till Johnson and the defendant gave evidence on the trial before him. As to the Division Court trial, in September, the defendant could not remember if he gave evidence then as to stamps. Notice was given of the defect in his written notice, and the Division Court clerk remembered something was said at the trial about stamps, and the plaintiffs' agent then applied for postponement. The learned Chief Justice thought that he might then be considered as having notice. The learned Chief Justice gave the plaintiffs leave to move to enter verdict for them for \$109, if the Court should think they put on the double stamps in time or could put them on in Court on hearing the evidence.

In Michaelmas Term, November 19, 1873, *Hardy* obtained a rule *nisi* to set aside the verdict and enter a verdict for the plaintiffs for \$109, pursuant to leave reserved.

In Easter Term, May 30, 1874, *M. C. Cameron*, Q. C., shewed cause. The evidence shewed that the stamps were not put on until after the plaintiff sued and non-suited in the Division Court. The stamps were not put on in time within the cases: *Wooley v. Hunton*, 33 U. C. R. 152; *Stephens v. Berry*, 15 C. P. 548; *Henderson v. Gesner*, 25 U. C. R. 184; *Joseph Hall Manufacturing Company v. Harnsden*, 34 U. C. R. 8. He also referred to 33 Vic. ch. 16, sec. 13.

Harrison, Q. C., contra. No constructive knowledge can be imputed to the plaintiffs such as the Court of Chancery deals with. The Statutes contemplate actual knowledge. Our first knowledge of the want of stamps was at the Division Court trial, as appears from the evidence, and we are within the stamp acts. He referred to *Bradlaugh v. DeRin*, L. R. 3 C. P. 286.

December 22, 1874, RICHARDS, C. J., delivered the judgment of the Court.

The question to be decided in this case turns on the construction to be put on the 11th and 12th sections of 31 Vic. ch. 9, D., as amended by 33 Vic. ch. 13, D., and declared to be substituted for the original sections in the Statute of 31 Vic.

The effect of sec. 11 as applicable to this case is, "If any person in Canada makes, * * becomes a party to, or pays any promissory note, * * chargeable with duty under this Act, before the duty (or double duty, as the case may be,) has been paid by affixing thereto the proper stamp, or stamps, such person shall thereby incur a penalty of \$100, and save only in case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity."

And sec. 12. "Any subsequent party to such instrument * * or any holder, without becoming a party thereto, may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty," (and by defacing the same as required by the 4th section of the Act), "and when upon the trial of any issue the validity of any promissory note * * is questioned by reason of the proper duty thereon not having been paid * * and it appears that the holder thereof when he became holder had no knowledge that the proper duty had not been paid, * * by the proper party or at the proper time, *such instrument shall nevertheless, be held to be legal and valid, if it shall appear that the holder thereof paid double duty so soon as such holder acquired such knowledge ; or if the holder thereof acquiring such knowledge at the trial or inquiry do thereupon forthwith pay such double duty ; or if the validity of such promissory note is questioned by reason of a part only of the requisite duty thereon having been paid at the proper time or by the proper party, and it appears to the satisfaction of the Court or Judge, that it was through mere inadvertence or mistake, and without*

any intention to violate the law on the part of the holder, that the whole amount of duty, or double duty, * * was not paid at the proper time, or by the proper party, such instrument and any endorsement or transfer thereof, shall, nevertheless, *be held legal and valid, if the holder shall, before action brought, have paid double duty thereon, as in this section mentioned, as soon as he reasonably could, after having become aware of such error or mistake.*"

Primâ facie the note was void under the Statute, for it was not stamped at the time of the making, nor double stamped at the time the plaintiffs became the holders thereof. It is for the plaintiffs to shew that they complied with the provisions of the Statute, which would make the note good in their hands.

We think the weight of evidence is, that the three cent stamp was on the note at the time they received it, and they were not aware that it was not put on when the note was made, as it contained the proper date on the face of the stamp, at the time they became the holders, in the words of the statute, they may be said to have "had no knowledge that the proper duty had not been paid." Then does it appear that they paid the double duty "so soon as they acquired such knowledge," or did they only acquire such knowledge at the trial?

As a general rule, knowledge in a party must be inferred from circumstances. The plaintiffs were notified before the 3rd of September, 1872, by the defendant, that he intended to set up the want of a proper stamp as a defence to this note. The notice to their agent must be considered as notice to them. Their agent attended the sitting of the Court in September, when the want of the proper stamp was referred to, and after that the plaintiffs obtained a postponement of the trial until November, and then suffered a nonsuit.

Why was the nonsuit suffered in November? Is not the reasonable inference, in the absence of any other explanation, because the plaintiffs had discovered that they could not succeed in the suit if this defence were set up?

If this be not the reason, what was it? No other is suggested. The matter is then delayed until April, and then the note is returned, and the double stamp put on. Had they then knowledge of the want of the proper stamps. If so, when did they obtain that knowledge? It is suggested not until the note was returned to them, and they saw there was only a three cent stamp on it.

But that fact was known to their agent in September at the sitting of the Court, when the postponement of the trial was obtained probably on that ground.

In the meantime had they made inquiries? If so, no evidence is given of it, nothing to shew that they did not know as well in September or November that the note was not properly stamped as they did in April. If they had such knowledge then they did not put on such double stamp as soon as they acquired such knowledge.

It is urged that they only acquired such knowledge at the trial of this cause. But the knowledge of their agents or attorneys must be considered their knowledge and the fair presumption from all the facts is, that the attorney or agent of plaintiffs obtained such knowledge at the trial of the cause in the Division Court, or at all events when the nonsuit was suffered in that Court in November, 1872.

To admit that the plaintiffs only had knowledge of the fact at the trial because sufficient evidence had not been given before to *satisfy them* that the bill had not been properly stamped, would be to lay down a rule of decision that would have a tendency to prevent such a defence from ever being set up. For the plaintiffs might always say, whenever a defendant set up a defence to a note that it was not properly stamped, that they did not believe such defence to be true, and when it was satisfactorily proven at the trial then all that would be necessary would be to put on the double stamp, and then the suit would go on.

We think the only reasonable and satisfactory way to carry out this law is, to hold that where reasonable notice of the want of proper stamps is brought to the knowledge

of the holder of a note, he must repel by reasonable evidence the presumption that he has the knowledge, or shew that as soon as he acquired the knowledge he affixed the double stamps, or that he made due enquiry, and from that enquiry he was led to believe that the note had been duly stamped; or perhaps it might be sufficient to shew that from his enquiry he had not reason to believe the note had not been duly stamped—in either of which cases he might be justified in not attaching the double stamp until he has knowledge by and at the trial.

In all these cases notice or knowledge by the attorney or agent of the holder must be considered his knowledge. If, after receiving reasonable notice and information of the want of proper stamps, he chooses to lie by and do nothing for months, we think, if the statute is to have any operation at all it must operate in such a case.

We think, under the evidence in this case given at the trial, we ought not to enter a verdict for the plaintiffs, and that the rule for that purpose must be discharged.

Rule discharged.

[IN THE QUEEN'S BENCH, AND IN ERROR AND APPEAL.]

THE CANADIAN BANK OF COMMERCE V. WILSON & MOUL.

Partnership—Note signed by one partner in fraud of the firm—Right of bona fide holder to recover.

Defendants and one M. were in partnership in the lumber business at Barrie, the two defendants residing there and M. in Hamilton. The working capital was \$5,100 furnished equally by the three, and was in M.'s hands; and the lumber was, by arrangement of the partners, to be consigned by the defendants to M., who was to accept their drafts for the value, and the necessary funds were to be raised by discounting them. The partnership was formed in December, 1873, and lasted until March, 1874, when M. absconded. In January, 1874, M. took to the plaintiffs a note for \$808 filled up in his writing, and purporting to be made by Wilson, Moul & Co., payable to himself, and endorsed by him, which the plaintiffs took from him for value. This note was made for his own private purposes in fraud of the partnership, and the evidence was contradictory as to whether the name of the firm was in his writing or not. The plaintiffs' manager swore that he relied on M.'s security and did not inquire about the firm. It was intended or agreed that the name of the firm should be Wilson, Moul & Co.; but that of J. Wilson & Co. was used until March without M.'s knowledge, when the former name was adopted.

The learned Judge who tried the case, without a jury, held that the defendants were not bound.

The Court of Queen's Bench held, as an inference of fact from the evidence (which is more fully stated in the case) that M. did sign the name of the firm as makers and in the proper partnership name; and they entered a verdict for the plaintiffs.

On appeal the Court was equally divided, Draper, C. J. of Appeal, and Strong, J., being of opinion that the appeal should be dismissed, and Burton and Patterson, JJ., contra. The judgment below was therefore affirmed.

Per Draper, C. J. of Appeal, and Strong, J.—The note was made by M. in the proper partnership name; and, assuming that he practised a fraud on his co-partners, the plaintiffs, being *bona fide* holders for value without notice, were still entitled to recover against the firm.

Per Burton and Patterson, JJ.—M., as between himself and his co-partners was not authorized to sign the note in their name, and the plaintiffs having avowedly accepted it on the security of M., not of the firm, about whom they knew nothing and made no inquiries, the defendants were not estopped from setting up M.'s want of authority to bind them.

DECLARATION on a promissory note, dated the 30th of January, 1874, made by the defendants, under the name of Wilson, Moul & Co., for the sum of \$808, payable to the order of J. C. McCarty, three months after date, and endorsed by McCarty to the plaintiffs.

Plea by defendants, denying the making of the note.

The cause was tried at the last Fall Assizes, held at Hamilton, before Patterson, J., without a jury.

The defendants and McCarty were proved to have been in partnership in the lumber business at Barrie, the two defendants residing there, and McCarty residing in Hamilton. The shipments of lumber were, by arrangement of the partners, to be consigned by the defendants to McCarty, and they were to draw on him for the value, and he was to accept the drafts, and in that way the necessary funds, by discount of the drafts, were to be raised. The partnership lasted till about March, 1874, when an attachment in insolvency issued against McCarty, who had absconded. The name of the partnership was Wilson, Moul & Co.

James Lockie said: I was acting manager of the plaintiffs' bank in January, 1874, in Hamilton. I knew McCarty; I frequently received papers from him. The note sued on was brought to me by him. The endorsement is in his writing. I took the note from him. The bank held it for a valuable consideration. The defendant Moul came to the bank after McCarty had gone. I do not recollect what conversation we had. The note is filled up in McCarty's writing, and I believe the signature also to be his.

Cross-examination.—I cannot say from memory when I received the note. I believe it to be at the time of its date. We took the note and another for an advance of \$2,000. It was not discounted in the ordinary way. We credited McCarty with the proceeds of \$2,000; that is, deducting the discount for three months. The other note was one of Thomas Attridge's for \$2,000. McCarty had a current account with us. The Attridge note was discounted, and the note sued on was collateral to it. The Attridge note has not been paid; there were no funds. Cannot say what the state of McCarty's account was then. He did not say what he wanted this money for. We had no account with Wilson, Moul & Co. McCarty's account was then very large. McCarty lived in Hamilton, and was engaged in many business operations. I am positive the note is filled up in McCarty's writing, and I think the signature is the same hand, but it looks as if written at a different time. The writings have a resemblance in their general appearance. I would not like to swear it was

written by McCarty. At the time the note was brought to me, I did not think whether the note was signed by McCarty or not. I made no enquiry about the note, because I relied on McCarty. I did not enquire about the firm. I asked McCarty what they did, and what the business was. I enquired, because McCarty was interested in them.

Charles R. Murray, the manager of the bank at Hamilton, spoke to the signature of the note. He said he had no doubt it was McCarty's writing.

The learned Judge, at the close of the plaintiffs' case, was of opinion that the note being brought to the bank by McCarty, who was engaged in many businesses, without its being shewn that it was a note in the business of defendants' firm, or that the bank knew McCarty was a member of it, was not, under the circumstances, proof of the making of the note by the defendants.

For the defence :

John S. Wilson, one of the defendants, said: I first became aware of McCarty using the name of the firm after he left the country. This note was not for the benefit of the partnership. We had paid our working capital, and it was in McCarty's hands. The working capital was to be \$5,100, furnished equally by the three. We were to get funds from McCarty by drafts from Barrie, through the Bank of Toronto. I had known McCarty about four years, and was in partnership with him before the partnership was formed. The note is filled up, and endorsed by McCarty, but it is not signed in his writing.

Cross-examination.—I can't say in whose writing the signature of the note is. There was a former firm of J. S. Wilson & Co., of which McCarty and I were partners. McCarty was to raise the cash: he said he could do it. We drew on him for about \$3,000. The drafts from Barrie were at first drawn in the name of J. S. Wilson & Co., and after in the name of Wilson, Moul & Co. We drew for more than the amount of lumber shipped. I did not know what bank McCarty did business in. We allowed him to accept our drafts payable where he liked.

Re-examination.—We sold out the interest at Wilson,

N.Y., for \$10,000, of which half was mine. My half paid for my interest in the Barrie business, and left a balance for working capital in McCarty's hands. The name of J. S. Wilson & Co. was used at first because that was a name known to the banks at Hamilton. It was used till the first of March, and after that the name Wilson, Moul & Co. was used.

John Moul, a defendant, was also examined. His evidence did not add anything to that given by Wilson, excepting that he also denied the signature of the note to be his, and he did not think it was McCarty's either.

He said, also, "The firm was to be Wilson, Moul & Co. I went after the partnership was formed back to Wilson, N.Y., to wind up my business there. When I came back I found they had been using the name of J. S. Wilson & Co. About March they commenced to use the name of Wilson, Moul & Co. We had to pay \$8,000 between us to McCarty. Wilson \$5,000, and myself \$3,000.

Alexander J. McBrier, who was eight years in McCarty's employment, and frequently saw him write, and *Miles Finch*, who was McCarty's book-keeper, said they did not think the signature to the note was in McCarty's writing.

At the close of the case, and after hearing the arguments of counsel for the parties, the learned Judge was of opinion, and so noted, "That the note in suit was not made by any member of the firm, nor for any business of the firm. It was presented at the plaintiffs' bank by McCarty, and was given to the plaintiffs as collateral security for a discount obtained by McCarty, and which was not for the purpose of the partnership. That McCarty did not profess to act in so presenting the note as a member of the firm, nor was the note made by him as a member of the firm; and (if in fact the note was made by McCarty, although on the evidence I should find it was not so made) it was made in so disguised a hand-writing, and was presented under circumstances to amount to a representation that it was not made by him; and in fact the plaintiffs did not take the note supposing it to have been made by him. I am not satisfied, from the

evidence, that the plaintiffs knew McCarty was a member of the firm ; but if they did, I would be disposed to infer, that from the fact of the note being made to McCarty, the proper conclusion is, that they had notice that it was not a *bonâ fide* firm transaction. On the whole, my conclusion is, that the defendants are not bound, and I therefore find a verdict for them. If the Court should decide otherwise, the plaintiffs will be entitled to a verdict, and \$837.50 damages."

In Michaelmas Term, Nov. 19, 1874, *Mackelcan* obtained a rule calling on the defendants to shew cause why the verdict for the defendants should not be set aside, and a verdict entered for the plaintiffs for \$837.50, on the ground that upon the law and evidence the plaintiffs were entitled to a verdict for the said sum.

Dec. 1, *McCarthy*, Q.C., shewed cause. The defendants are not liable, because McCarty did not in fact sign the note, nor did either of the defendants ; and it is not, therefore, their note. If, however, McCarty did sign the note, still the defendants are not liable, because he signed it in the name of Wilson, Moul & Co., and the proper name by agreement was, and should have been, J. S. Wilson & Co. The bank did not know who composed the firm, whose name was put to the note. They did not know McCarty was a member of it. McCarty used the note of the firm, or purporting to be the note of the firm, for his own private purposes. The bank knew he was getting the sole benefit of it. The bank was bound to prove they gave value, as a part of their case, upon the evidence which was given.

The following authorities were cited : *Alliance Bank (Limited) v. Kearsley*, L. R. 6 C. P. 433 ; *Garland v. Jacomb*, L. R. 8 Ex. 216 ; *Kirk v. Blurton*, 9 M. & W. 284 ; *Faith v. Richmond*, 11 A. & E. 339 ; *Norton v. Seymour*, 3 C. B. 792 ; *Lindley* on Part., 3rd ed., vol. i., 345-7 ; *Byles* on Bills, 11th ed., 43 ; *Leverson v. Lane*, 13 C. B. N. S. 278 ; *Shirreff v. Wilks*, 1 East 48 ; *Hogg v. Skeen*, 18 C. B. N. S. 426 ; *Warner v. Smith*, 1 DeG., J. & Sm. 337 ; *Ellston v. Deacon*, L. R. 2 C. P. 20.

Mackelcan supported the rule.

The delivery by McCarty of the note to the bank as the note of the firm of which he was a member was a making of the note by the firm, or equivalent to it. The discount which was made for McCarty on the note for \$2,000, at the time he deposited the note sued on, was in effect a discount upon the security of the two notes. This is not to be likened to the taking by the bank of the note for a pre-existing debt of McCarty. There was a new consideration between the parties at the time of this discount.

The want of knowledge by the bank of McCarty being a partner was only material in determining whether the bank and McCarty dealt in good faith.

The weight of evidence establishes that the note was signed by McCarty, and that the bank did not know he was a partner in the makers' firm.

He cited the following cases: *Ex parte Bushell*, 3 M. D. & DeG. 615; *Lane v. Williams*, 2 Vern. 277; *Wintle v. Crowther*, 1 Cr. & J. 316, 1 Tyr. 210; *Thicknesse v. Bromilow*, 2 Cr. & J. 425; *Ridley v. Taylor*, 13 East 175; *Sanderson v. Brooksbank*, 4 C. & P. 286; *Swan v. Steele*, 7 East 210; *Lewis v. Reilly*, 1 Q. B. 349; *Stephens v. Reynolds*, 5 H. & N. 513; *Kirk v. Blurton*, 9 M. & W. 284; *MacLae v. Sutherland*, 3 E. & B. 31-36; *Lloyd v. Ashby*, 2 B. & Al. 23; *Williamson v. Johnson*, 1 B. & C. 146; *Norton v. Seymour*, 3 C. B. 792.

December 22, WILSON, J., delivered the judgment of the Court.

The case was argued at very considerable length, and many authorities were cited by the counsel, but it cannot be necessary to follow the argument in detail, nor to examine the cases to which we were referred, from the view we take of the facts of the case.

We are of opinion, as an inference of fact from the evidence, that McCarty did sign the name of the firm to the note.

The evidence is quite as strong for the plaintiffs as it is for the defendants, as to the writing of the signature being

or not being that of McCarty. But the unquestioned facts show almost to a certainty that McCarty did sign the note. As he filled in the body of the note, he must have known where it came from, what it was meant for, and who was to get it.

As he was the payee, it was his interest to complete it, and he did use it when completed. He must have known that his partners did not sign it, and it is highly improbable that their signature was imposed upon him by any one as a genuine signature when it was a forgery.

He had in law the authority to sign the note, and the presumption would be against a forgery in such a case having been committed by any one.

I am disposed to think, by his endorsing the note, which at any rate purported to be the note of the firm, that not only was he bound by the estoppel raised by his endorsement, but that he and his partners became bound by his using it and transferring it as a valid partnership note.

The proper conclusion from all the facts is, that the name to the note was put to it by McCarty.

If he made the note, then was it made in the proper name of the firm? There is as much evidence of the name of Wilson, Moul & Co. being the proper name of the partnership as that the name of J. S. Wilson & Co. should have been used, although Wilson understood the latter name was to be used because better known. Moul knew nothing of that, and thought the name of Wilson, Moul & Co. was to have been used, which was the real and proper partnership style: *Alliance Bank (Limited) v. Kearsley*, L. R. 6 C. P. 433.

We think the note was made in the proper partnership name.

If, then, the defendants are not to pay the note, it must be because McCarty made the note in the partnership name for his own private benefit, and deposited it in the bank upon his own private account, and the bank knew he was using the partnership note not for the partnership purposes, but for his own private benefit, or because they did not give value for it.

Did the bank, then, know he was using the partnership name for his own personal use, and did the bank give value for the note? In most cases of the kind the partner who abuses his trust simply signs the name of the firm, and under that signature gets the benefit he desires. In such a case the person dealing with the partner must know or assume he is such partner, because by no other signature could he get the benefit of the name: *Leverson v. Lane*, 13 C. B. N. S. 278.

But if a partnership note be payable to a particular member of it, and he negotiates it, he does so not as a member of the firm, but as payee and endorser; and the person or bank taking the note from him cannot necessarily know, nor have any reason to suppose, he is a member of the partnership. And if in truth the endorsee do not know the endorser is a member of the firm, and give value for the note, there can be no reason why the endorser should not recover against the partnership, so far as the question of notice is concerned: *Hogg v. Skeen*, 18 C. B. N. S. 426.

It was apparently one of the strong points at the trial for the defence that the plaintiffs did not know McCarty was a member of the firm, and that he had disguised his hand so that they should not know either that fact or that he signed the note.

If that be so, they could not possibly know or suspect he was using the partnership name for his own private purposes. I am of opinion the bank had no such knowledge.

Then, as to value given by the bank. The bank, on the endorsation and deposit of this note as a security, discounted for McCarty a note of much greater amount. That was value given.

In every way of considering the case, we are of opinion the case has been fully sustained, and that the verdict for the defendants must be set aside, and a verdict entered for the plaintiffs, with damages to the amount of \$837.50.

The rule will be absolute.

Rule absolute.

From this judgment the defendants appealed to the Court of Error and Appeal, upon the following grounds : —1. The Court of Queen's Bench erred as to the facts, in finding that the promissory note sued on was signed in fact by the defendants' partner, J. C. McCarty ; and the finding of the learned Judge who tried the case without a jury to the contrary, and who had the opportunity of observing the demeanor of the witnesses under examination was right, and his opinion is entitled to more weight than the finding of a jury would have had : *Smith v. Hamilton*, 29 U. C. R. 394.

2. The appellants, as the partners of McCarty, the payee and endorser of the said promissory note, assuming it to be a forgery, could not be estopped by the endorsation of McCarty in his own name, although he, (McCarty), would be so, from denying the making of the said note. The doctrine of estoppel in such cases does not go beyond estopping the subsequent party to the note ; but a firm are not in any way bound unless the partnership name is used : *Nicholson v. Ricketts*, 29 L. J. Q. B. 55 ; *Brook v. Hook*, L. R. 6 Ex. 89 ; *Thicknesse v. Bromilow*, 2 C. & J. 425.

3. The name used by consent of the firm at the time the said note purports to have been made was that of "J. S. Wilson & Co." not "Wilson, Moul & Co.," the name purporting to be signed thereto ; and the appellants would not be bound as the makers of the note, even if the note was signed by their partner and for partnership purposes, if the name used in making it was not their partnership name : *The President, &c., of the South Carolina Bank v. Case*, 8 B. & C 427 ; *Smith v. Craven*, 1 C. & J. 500 ; *Bottomley v. Nuttall*, 5 C. B. N. S. 122.

4. The Bank, (the respondents), in receiving the note took it as collateral security for the private debt of the payee and endorser of the same, the said McCarty, the appellants' said partner, and not for partnership purposes, as found by the learned Judge who tried the cause, as well as by the Court below ; and McCarty's so dealing with the note was a fraud on the appellants, his partners, and the

respondents under such circumstances could not recover against the appellants. *Lererson v. Lane*, 13 C. B. N. S. 278; *Ex parte Darlington Joint Stock Banking Co., Re Riches*, 4 DeG. J. & S. 581; *Ellston v. Deacon*, 2 C. P. 20.

5. There was abundant evidence that the respondents knew that the said McCarty was a member of the said firm in which the appellants were partners, and consequently the respondents could not recover. But whether the respondents had express notice or not, they must be presumed, in the absence of evidence to the contrary, to have had knowledge of whom the makers of a promissory note were, which they allege they hold for value.

6. Should the Court be of opinion that it rested on the appellants to prove that the respondents, at or before they took the said note from the said McCarty, knew that the alleged firm of Wilson, Moul & Co. had as a member the said McCarty, and that there is not evidence on that point, which the respondents contend there is, it is submitted that there should be a new trial, or that this honourable Court should, under the power given by the 11th section of The Administration of Justice Act, 1874, receive evidence on the said question of fact, as the respondents' knowledge of it can be clearly established, and in fact it was not questioned at the trial.

The following are the respondents' reasons against the appeal:—1. It was proved as a matter of fact that the promissory note sued on was negotiated as a note of Wilson, Moul & Co. by J. C. McCarty, who was a member of the firm, and it was not necessary to prove in whose actual handwriting the note was signed. McCarty had power to make notes in the name of the firm, and produced this note as one made by the firm, which is equivalent to a making by him of the note in their name.

2. The finding of the Judge that the note was not made by any member of the firm was contrary to the evidence, and plainly inconsistent with the undisputed facts, that the note was filled up in McCarty's handwriting, and was en-

dorsed by him, and was used by him as a genuine note of the firm of Wilson, Moul & Co. The hypothesis suggested on the part of the appellants that some other person might have signed this note, and have imposed upon McCarty by a forged signature, is not supported, by evidence or reason. The Court had power (under Ont. Stat., 33 Vic. ch. 7, sec. 6) to pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced, and the case of *Smith v. Hamilton*, decided before the passing of this Act, is now no longer applicable.

3. The endorsement of the note by Mr. McCarty was an adoption of it as a note of the firm, and such an adoption by him was binding on the firm to the same extent as a making of the note by him would have been.

4. The name of Wilson, Moul & Co. was agreed upon from the first as the co-partnership name, and this agreement was never altered. Wilson used the name of J. S. Wilson & Co. for a time for a special purpose, namely, for the purpose of drawing drafts on McCarty through the Bank of Toronto, at Barrie; but this was done without the knowledge or consent of Moul. The name of J. S. Wilson & Co. so used, was that of a former partnership between Wilson & McCarty, and was used in the Bank for a time as a matter of convenience only, for the reason that it was already known in the Bank, and not because it was the name agreed upon for the new firm.

5. It is clear upon the evidence that the name, "Wilson, Moul & Co.," was intended to designate the firm composed of the appellants and McCarty, and even if another designation would have been more correct, a signature in this name would bind the firm: *Lloyd v. Ashby*, 2 B. & Ad. 23; *Stephenson v. Reynolds*, 5 H. & N. 513.

6. The respondents, on receiving the note sued on, took it as one of the securities for money then advanced by them upon this and other notes, and not as a collateral security for the private debt of McCarty. McCarty had power to borrow money upon the security of a note of the firm, and if he had made the note payable directly to the

Bank, and received the money for it over the counter, the appellants would have been liable. The fact that McCarty endorsed the note in his own name, thereby giving the Bank the additional security of his separate liability, does not take away or destroy the liability which would otherwise have attached to the firm, nor does the mode adopted by the Bank of paying over the amount advanced affect the merits of their claim. The placing of a sum of money to McCarty's credit in his current banking account was the same in effect as handing it over to him in specie. If the latter mode of payment had been adopted the appellants would have been liable on this note, and there is no reason why they should not be similarly liable when the payment was made in the mode first mentioned,

7. The evidence shewed that McCarty had accepted and paid drafts drawn from Barrie for the purposes of the firm, and that the money so paid by him was the only working capital the firm had. The appellants looked to McCarty to raise money as best he could for the purposes of the co-partnership, and in borrowing money upon the note of the firm he was not exceeding his authority as a co-partner to bind the appellants. Whether he paid over for the use of the co-partnership more money than he so borrowed, or less, does not clearly appear. If he misapplied any portion of the funds it would not affect the respondents' right to recover: *Lindley on Partnership*, vol. i., 3rd ed., 280, 283, and 343.

8. The manager of the respondents' branch at Hamilton, when he took the note sued on, did not know who were the members of the firm of Wilson, Moul & Co., nor that McCarty was a partner of that firm, and had made the note, and it cannot be held that he was a party to a fraud in taking the note from McCarty under the circumstances and for the consideration proved at the trial: *Ridley v. Taylor*, 13 East 175; *Wintle v. Crowther*, 1 C. & J. 316; *Musgrave v. Drake*, 5 Q. B. 185.

9. All the persons cognizant of the matters in issue (excepting McCarty, who is stated to have left the country

and to be out of reach) were examined as witnesses at the trial, and there is no further evidence to be obtained upon the point suggested in the sixth paragraph of the reasons of appeal.

10. If the respondents were aware when they took the note that McCarty was a member of the firm of Wilson, Moul & Co., and had himself made this note, they would still be entitled to recover in this action : *Ex parte Bushell*, 3 Mon. D. & D. 615 ; *Ex parte Meyer*, DeG. 632 ; *Lane v. Williams*, 2 Vern. 277 ; *Swan v. Steele*, 7 East 210 ; *Lewis v. Reilly*, 1 Q. B. 349.

The case was argued in appeal on the 17th June, 1875.
D. McCarthy, Q. C., for the appellant.

C. Robinson, Q. C., contra.

[The argument and the cases cited sufficiently appear from the reasons for and against the appeal, and the judgments.]

Sep. 25, 1875, DRAPER, C. J. of Appeal (*a*). The respondents declared on a promissory note dated 30th January, 1874, drawn at three months, payable to the order of J. C. McCarty, for \$800.

The appellants pleaded *non fecerunt*.

The leading facts proved were as follows : Wilson, Moul & McCarty became partners about 1st December, 1873, in a lumber business at Barrie, and their partnership continued until March, 1874, when an attachment was issued against McCarty, (I presume as an absconding debtor.) A witness named *Carscallen* relates the statements of the two defendants to the effect following : The firm was Wilson, Moul & Co. The lumber was shipped from Barrie to McCarty, who appears to have lived in Hamilton, and the defendants drew on him against the shipments, and the firm obtained funds through those drafts, and they drew in excess of the shipments. The drafts were drawn by Wilson, Moul & Co. on McCarty.

(*a*) *Present* : DRAPER, C. J. of Appeal, STRONG, J., BURTON, J., PATTERSON, J.

Mr. *Burns*, the agent of the Royal Canadian Bank at Hamilton, stated that he knew from conversations with defendants that they were partners with McCarty in the Barrie lumbering business. The firm was Wilson, Moul & Co.

Mr. *Lockie*, acting manager of the plaintiffs at Hamilton, proved that McCarty brought the note sued upon to him, endorsed by himself; that the plaintiffs held it for valuable consideration. It was taken, together with a note for \$2,000, made by one Thomas Attridge, which the plaintiffs discounted, and credited McCarty with the proceeds; and the note sued on was collateral to it. Attridge's note has not been paid. McCarty had a very large account current with the plaintiffs, but Wilson, Moul & Co., kept no account with them. The note in question was, this witness said, "filled up in McCarty's writing," and he believed the signature to be his also. He made no inquiry about the note, relying upon McCarty, but he did inquire about the firm, what they did, and what their business was; he inquired, because McCarty was interested in them. There was some further slight evidence as to the signature being in McCarty's handwriting.

On the defence both the defendants were examined. *Wilson* stated there was no written agreement (of partnership) between them and McCarty: that McCarty had no *express* authority to draw notes in the name of the firm; and he swore the note sued on was not made for the benefit of the partnership. According to him the partnership agreement was, that the working capital was to be \$5,100, equally furnished by the three partners. That Moul and Wilson paid their shares into McCarty's hands, and they were to get funds from him to carry on the business, by drafts drawn by them in Barrie, through the Bank of Toronto. The payment of their shares to McCarty was principally in notes of hand or other securities upon which he was to raise money. He accepted those securities as cash. They drew on him for near about \$3,000, and got the money in part on those drafts. These drafts from

Barrie were at first drawn in the name of "J. S. Wilson & Co." and after in the name of "Wilson, Moul & Co." McCarty and Moul went to the Bank of Toronto in Barrie, when they arranged for their account there, and that McCarty was to accept drafts of the firm. The name of J. S. Wilson & Co. was used at first, because that was a name known to the banks at Hamilton. Both these defendants directly or indirectly denied having signed the note, and also expressed their belief it was not signed by McCarty.

I am of opinion that this evidence leaves no room for doubt, that at the date as well as the negotiation of this note the two defendants and McCarty were co-partners under the style and firm of Wilson, Moul & Co.: that this was their first intention, and although they used the style of J. S. Wilson & Co. for a particular reason, yet that they soon gave it up, and used the name originally agreed upon between them.

It cannot be disputed that any member of an ordinary trading partnership can bind the firm by making and indorsing promissory notes in its name. Was this promissory note signed by any of these three partners?

After repeated consideration I agree in the conclusion of the Court below, and am of opinion that McCarty signed it, and very probably, as I fear, for a fraudulent purpose. His subsequent absconding might well lead to that conclusion. It is certainly possible that he made this note for the purpose of raising money for the partnership and to procure funds to meet the drafts drawn upon him by his co-partners in excess of the value of the lumber shipped by them to him; but I cannot find sufficient, nor indeed any proof, to support that suggestion. But if it were so it would not help the defence, because then the plaintiffs' right to recover would be the more clear, as the note would have been made and negotiated for a partnership purpose. In arriving at the conclusion that McCarty signed it, I regret that I should differ on a question of fact from my learned brother who tried the cause, and who held that the note was not signed by a member of the firm. It is not, how-

ever, a question upon which the demeanor of a witness or his general character can be brought in aid of or adversely to the testimony he has given. Impressed with the idea that McCarty has acted a fraudulent part, I think he would not risk the employment of a third party, who might expose him to most serious consequences, and he would prefer writing the name of the firm, though not without attempting to disguise his own handwriting. The evidence pro and con seems to me, as it did to the Court below, evenly balanced, and it is not without doubt that I have adopted my conclusion.

I do not attach much importance to the question whether the plaintiffs' manager did or did not know that McCarty was a member of the firm of Wilson, Moul & Co., though on the whole I think it more probable that he did than that he did not. The partnership was advisedly pledged when the note was negotiated by one of the firm, in which case the whole partnership, whether they are named or not, and whether the partners are known or secret partners, will be bound unless the title of the person who seeks to charge them can be impeached: *Wintle v. Crowther*, 1 Cr. & J. 316.

There is no doubt that McCarty endorsed the note and transferred it to the plaintiffs for a valuable consideration. As a question of law, then, it appears to me to be simple. Why then should not the plaintiffs recover? When once the case has reached that stage, no other answer has been made than that McCarty endorsed and transferred it in fraud of his co-partners. I think that answer insufficient, unless it further appears that the plaintiffs gave no value, or rather the necessity of proving that they gave value is then put upon them. I am of opinion that they have satisfactorily complied with this obligation.

I conclude, therefore, that the judgment of the Court of Queen's Bench ought to be upheld, and the appeal be dismissed with costs.

STRONG, J.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. I think the

proper conclusion from the evidence is, that the note sued upon was signed in the partnership name by McCarty.

So far as the facts depend on the credit to be given to the witnesses, the finding of the learned Judge before whom the cause was tried ought to be decisive. An appellate Court having power to decide questions of fact is, however, bound to take into consideration all the circumstances of the case, and to give effect to all the presumptions warranted by the evidence.

Two witnesses called by the plaintiffs expressed the opinion that the signature to the note was in the handwriting of McCarty, whilst three witnesses called for the defence, and the defendants themselves, were of a contrary opinion.

The testimony consists entirely of statements, not of facts, but of judgment and belief, and it is therefore most material to look to the probabilities of the case.

The note was, according to two of the defendants' witnesses, *French* and *Don*, filled up in McCarty's handwriting, and it was indorsed by him. McCarty had authority to sign the partnership name for partnership purposes, and the note came from his possession.

It is therefore hard to conceive any motive which could have led him to procure it to be fabricated by another.

That McCarty endorsed the note, though it may not amount to an estoppel against the defendants, yet raises a strong presumption in point of fact against his having taken the trouble to procure the commission of a useless forgery.

I think, therefore, that this circumstantial evidence, coupled with that of the two Bank managers, who recognized the signatures as genuine, outweighs the testimony of the defendants' witnesses, who speak merely as to their judgments on a subject open to such wide difference of opinion as handwriting.

Then arises the question,—was Wilson, Moul & Co. the proper partnership name? The defendant Moul says on his re-examination, "the firm was to be Wilson, Moul & Co."

The learned Judge who tried the case finds that it was agreed "that the firm should be Wilson, Moul & Co."

It is true that, without the privity of Moul, for some purpose of banking convenience, the name of J. S. Wilson & Co. was used in drafts drawn by Wilson, at Barrie, on McCarty at Hamilton, up to the 1st of March, 1874; but this is not shewn to have been the result of any new agreement to change the partnership name, and as it was without the knowledge or privity of Moul, it could not affect the first agreement already referred to.

After the 1st of March the name of Wilson, Moul & Co. was used in these drafts drawn at Barrie, and that use of it can be referred only to the agreement as to the partnership name come to when the firm was constituted in December, 1873.

There is nothing in the evidence establishing that either by express contract or conduct the original name had been abandoned, and that of J. S. Wilson & Co. substituted for it.

Then it cannot be questioned that the plaintiffs gave value. They took the note as collateral to one made by Attridge, which they discounted on the same day, the proceeds being placed to the credit of McCarty in his account at the Bank.

That McCarty committed a fraud on his partners in the disposition which he made of the proceeds of the note may be taken as proved, but it is not proved that the plaintiffs had any notice of this fraud, and the learned Judge finds that their manager did not know that McCarty was a member of the firm, nor that the note was signed by him when he took it.

The law applicable to these facts is clear. The holder for value of a negotiable instrument, which has been signed by one partner in the partnership name in fraud of his co-partners, cannot be affected by such fraud, unless it can be established that such holder took the note with notice: *Wiseman v. Easton*, 8 L. T. N. S. 637; *Leverson v. Lane*, 13 C. B. N. S. 278; *Ridley v. Taylor*, 13 East 175.

In the present case no question is raised as to the plain-

tiffs being holders for value, and the plaintiffs cannot be said to have had notice in the face of the findings that the manager did not know that McCarty was a member of the firm, nor that he had signed the note.

I have put the case in the strongest form in which it can be put against the plaintiffs; but if the bank had had notice of all the facts it would, in my opinion, have been difficult to say that they could have been affected by any fraud, for according to the evidence of Wilson McCarty was to raise money to meet drafts, and drafts were in fact drawn in excess of consignments made to him.

If this were the understanding, had he not a right, as between himself and his partners, to use the partnership name to raise the cash required to meet their overdrafts, and if so, could it make any difference that he did so use it by making notes payable to his own order?

If the two facts which the defendants sought but failed to prove—viz., that the plaintiffs' manager knew when he took the note that McCarty was a member of defendants' firm, and that he had himself made the note—had been established, I should still have thought that the case would have admitted of considerations favorable to the plaintiffs' right to recover.

My judgment, however, proceeds upon the same ground as that of the Court of Queen's Bench, namely, that the note was made by McCarty in the proper partnership style, and that assuming that there was a fraud practised by McCarty on his co-partners, the plaintiffs are *bonâ fide* holders for value without notice of that fraud.

I think the Appeal should be dismissed with costs.

BURTON, J.—I have the misfortune to differ from the opinions expressed by the learned Chief Justice and my brother Strong. I cannot but feel, therefore, very much diffidence in my own opinion, and I should have been pleased to have taken further time for the consideration of this case. As, however, my decision cannot affect the result, I have not thought it necessary to ask for its post-

ponement, but feel it due to them to state shortly the grounds on which I feel forced to differ with them.

I have not drawn the same conclusion from the evidence, as the learned Chief Justice. In my view of that evidence, McCarty had accepted from his partners securities, which he agreed to treat as their contributions to the capital stock, and he was not, as between himself and his partners, authorized to pledge the credit of the firm by the use of the partnership name. The conclusion, also, that I should have drawn from the evidence, would be that it was merely contemplated to use as the partnership name that of Wilson, Moul & Co., but that was subsequently abandoned and the name of J. S. Wilson & Co. substituted; and in point of fact at the time of the making the note in question no other name than that of J. S. Wilson & Co. had been used.

Assuming, however, in accordance with the finding of the Court of Queen's Bench, that the partnership style was Wilson, Moul & Co., it is clear, in the view which I take of the evidence, that he had no authority as between himself and his co-partners to bind them by any such engagement. The authority of one partner to bind the firm is not an inseparable legal consequence of his interest in the partnership, but is an actual agency implied from the supposed assent of the other members. All parties, therefore, dealing with the one partner in a matter within the scope of the business carried on by the firm, would have a right to assume that such authority existed, and would be protected; but he has no implied power to bind the firm in any engagements which are unconnected with and foreign to the partnership; though he himself would be bound, his co-partners would not be, without affirmative evidence of the consent of the other members.

If McCarty had presented this note to the Bank as security for his own debt, informing the Bank manager that he was a partner in the firm, it is clear that the Bank could not recover upon it against these defendants without proof of their original consent or subsequent ratification, or of

such circumstances as would lead to the inference that it was given with the consent of the partners. And here I think the learned Judge who delivered the judgment of the Court below misapprehended the argument of the appellants' counsel.

It was not contended that the signature of the firm had been imposed upon McCarty as a genuine signature, when in fact it was a forgery, but that he had designedly procured the note to be signed by some one else, in order to deceive the Bank and conceal from the manager the fact that the paper was that of his own firm—that in his interview with the Bank manager he acted a lie, if he did not give utterance to one, when he led him to suppose that the note was granted by a firm with which he was unconnected, and that it had come into his hands in the usual course of business.

I do not think it can be material whether the partner signs the partnership name himself or directs some one else to do so. He could not delegate to another, probably, the discretion to accept or not accept or make such paper, but having himself decided to issue the paper the party signing by his direction is a mere amanuensis, and the firm equally bound as if he had himself affixed the signature.

It being then admitted that, except as regards *bond fide* holders for value, McCarty had no power to bind his partners by this note, upon what principle are these plaintiffs entitled to recover?

If McCarty, professing to act as one of the firm, had discounted this note in the ordinary course of business, they would of course have been liable; if he discounted it, not as a member of the firm, but avowedly for his private account, or transferred it in payment of a separate debt of his own, such a transaction would *primâ facie* be in excess of his authority, and could not be enforced without proof of his authority. If not professing to be a member of the firm he practices a fraud both upon his partners and the bank, by negotiating paper purporting to be the paper of the firm, who is to suffer?

The partners gave authority impliedly to bind them in all

matters within the scope of the partnership business, and among other things by promissory notes and bills of exchange in the name of the firm, because it is in the usual course of mercantile transactions so to do. The Bank therefore treating with him as one of the firm could safely take the paper of the firm; but here the Bank did not deal with him as one of the firm, they dealt with him simply as an individual; he did not pledge or profess to pledge the credit of the firm; on the contrary, he led the Bank to believe that the firm were strangers. Why, then, should these parties, who gave no authority to act for them, be bound when he has exceeded his authority and the bank have not taken the paper on the faith of such authority?

I can well understand that if negotiable paper of a firm be given by one partner in fraud of the partnership, and it pass into the hands of an innocent and *bonâ fide* holder for value, the party who has taken that paper without the means of knowing from the paper itself on what account it was created, but seeing that it bore the signature of one of the firm, has a right to presume that it was a legitimate partnership engagement. The other partners have placed it in his power to do a wrong, and if one of two innocent parties are to suffer, they who have enabled him to do the wrong ought to do so rather than the other; to hold otherwise would strike at the root of all commercial dealings. But what presumption is there in this case? The plaintiffs did not enquire or trouble themselves to enquire about the firm; they accepted the security not on the faith that it was signed by one of the partners and so that the firm were liable, but on the security of McCarty, on his guarantee that the notes were what they purported to be, and that he would pay in the event of default.

The Bank manager admits that he knew nothing of the firm or of the parties composing it, and that he did not enter into the engagement upon the credit of the partnership, but upon that of McCarty.

I think it would be doing no injustice, and would not be in conflict with the decisions, to hold that these defen-

dants are not liable. They never in fact contracted; the plaintiffs did not accept the note on the faith that it was signed by one partner of a commercial firm who presumably had power to bind the others, and being ignorant of the fact that McCarty was a partner the defendants are not estopped.

I am further of opinion that the defendants had never held themselves out to the world, nor to these plaintiffs, as trading under the firm of Wilson, Moul & Co., and that that was not their then partnership name; and on this ground the plaintiffs are disentitled to recover.

I have not for, the reasons stated, considered it necessary to enter more fully upon the grounds of my decision, but I have seen the very able judgment of my brother Patterson, with which I concur.

PATTERSON, J.—On the argument before us Mr. Robinson contended that no appeal would lie in this case. The objection was not suggested in the respondents' reasons against the appeal; but being a question of jurisdiction we must entertain it, as indeed we should have been bound to do whether suggested by counsel or not.

The Law Reform Act, 33 Vic., ch. 7, sec. 6, O., provides that "Whenever the verdict or finding of the Judge is moved against under sub-sec. 2, of sec. 18 of the said Act (the Law Reform Act of 1868), it shall not be obligatory on the Court * * to grant a new trial when the objections taken are against the sufficiency of the evidence, or the erroneous view taken thereof by the Judge, or on a mistaken view of the law of the case; but the Court may pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced, and amend the *postea*, and enter the verdict accordingly, *subject nevertheless to appeal on the same grounds as if the decision of the Court had been to grant a new trial, instead of ordering the postea to be amended.*"

Under this provision an appeal will not lie from any decision resting on the weight of evidence only, as there would be no appeal from a judgment granting a new trial

upon that ground. But if the decision is based upon a ruling respecting the evidence, which if addressed to a jury would be the subject of a motion for misdirection, then I apprehend it can be reviewed in Appeal.

In the present case the decision of the issue on the plea of *non fecerunt* involved the finding upon two questions of fact, amongst others, viz., was the note made by McCarty, and did McCarty make the note in the partnership name?

At the trial I found that McCarty did not make the note. The decision of the Court of Queen's Bench is that he did make it. I am inclined to think that this may be regarded as a decision on the weight of evidence only, and that if the case turned on this question alone, no appeal would lie. I am not quite clear as to this; because if a jury had found as I did, on a charge that it was necessary that the note should be signed by McCarty's own hand, I suppose a rule for a new trial would be partly, if not wholly, on the ground of misdirection. The case, however, does not rest entirely on this finding, and for my own part I agree with the decision of the Court. I never supposed that the note was a forgery by which McCarty had been imposed upon. I thought, and I still think, that the weight of evidence was decidedly to the effect that McCarty did not sign the note with his own hand. I was satisfied that he did not intend the Bank to suppose that the note was made by him. My idea was, from the proved dissimilarity between the signature and McCarty's ordinary handwriting, as well as from the mis-spelling of one of the names, that he had probably procured some one to write the signature; and, doubting whether this would be a making of the note by McCarty within the implied agency of a partner, I gave effect to the view which I took of the evidence as to the handwriting. I have now no doubt that if one partner decides to make a note in the partnership name, and procures a stranger as his amanuensis to write the signature, the effect is the same as if he wrote it himself.

I held also that the name Wilson, Moul & Co. was not the partnership name when the note was made. The

Court hold that the note was made in the partnership name.

This is not a finding of a simple fact upon the evidence. It is rather the legal result of other facts. The name actually in use by the partners in their business not being the name by which this note was signed, a jury would have to be charged either that they might or that they could not properly find that a name once agreed upon but never actually used was, for the purpose of this enquiry, the partnership name. A motion against a verdict rendered on such a charge would be on the ground of misdirection. If a new trial were granted or refused an appeal would lie, and therefore we have jurisdiction to examine this finding, and we have jurisdiction also to enquire whether these two questions of fact conclude the matter.

After giving the subject much consideration, I am still of the same opinion as at the trial, that for the purpose of our present inquiry the partnership name was J. S. Wilson & Co., and was not Wilson, Moul & Co. I hold this opinion on grounds which are really not touched upon in the judgment of the Court of Queen's Bench. I regret that I have not the advantage of knowing the view taken by that Court on what seems to me the test of the matter. But I feel more confidence than I should otherwise feel in the opinion I have formed, from finding that in the case of *The Royal Canadian Bank v. Wilson*, 24 C. P. 362, in which the same evidence was given on this subject as in the case before us, the Court of Common Pleas have sustained the view which I took.

It is important to keep in view the fact that, as between the partners, McCarty had no right to make or to negotiate the note in question. This has not been questioned, and it is expressly sworn to by the defendant Wilson. It is also the fact that as between the partners he had no right to make any negotiable paper. This is the fair result of the evidence, and there is nothing shewn to the contrary. The evidence of the defendants in effect is, that the three partners were to contribute \$5,100 in equal shares as working

capital; that Wilson and Moul, who had but little money, but had securities, were to give these securities to McCarty as cash—and McCarty did accept them as cash—for the amount of their shares of the capital, as well as for what they had to pay McCarty for the interest which they purchased in the business; and that McCarty, who lived at Hamilton, was to provide the money required for the business at Barrie by accepting and paying drafts, which were to be drawn on him at short dates, against the \$5,100, by Wilson, for the firm, at Barrie. These drafts were not to be for the purpose of borrowing money on the credit of the firm; but the position as among the partners was, that McCarty had the \$5,100 in his hands, and was to remit money, as required, to Barrie, by means of these drafts on him which he was to pay. It was no concern of Wilson or Moul where or how McCarty got the money to pay the drafts. He clearly had no authority to pledge the credit of the firm for the purpose.

The language of Bayley, J., in *Greenslade v. Dower*, 7 B. & C., at p. 638, is not inapplicable to their position. "If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of founding the partnership. Originally each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others: no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt."

The evidence further is, that when the partnership was formed the name *was to be* Wilson, Moul & Co.; that was talked of among them. There was no written agreement. But from the very start of the business the name of J. S. Wilson & Co. was used, and that was the only name used until a month after the note now in question was made, when for the first time the name of Wilson, Moul & Co., was used. The transactions in which the name of J. S.

Wilson & Co. was shewn to have been used were the drawing on McCarty of the drafts on account of capital, and other drafts on account of lumber shipped to him. It did not appear that there were any other transactions, or any books or accounts, or any occasion whatever, except the drawing of the drafts, in which the partnership name was ever required or used. The whole evidence respecting the name is very short. On the part of the plaintiffs the witnesses were Mr. Burns, the agent of the Royal Canadian Bank, who had been called on by the defendants after McCarty had absconded, and Mr. Carscallen, an attorney acting for the Royal Canadian Bank, who had been present at the interview. These gentlemen were called to prove that they learned from the defendants on that occasion that they were partners of McCarty, and both of these witnesses stated that the firm was Wilson, Moul & Co. Carscallen, in addition to that interview, had seen the defendants again when he examined them in another suit. The evidence of these witnesses, though sufficient for the *primâ facie* case of the plaintiffs, was obviously of no value whatever on the question between the two partnership names. The other evidence was that of the defendants themselves. The defendant Moul said, "The firm was to be Wilson, Moul & Co. That was talked of, I think, when we first formed the partnership. I was at Barrie then, and went back to Wilson, N. Y., to wind up my business. When I came back I found they had been using the name of J. S. Wilson & Co., and about the first of March they commenced to use the name of Wilson, Moul & Co." And the defendant Wilson said, "The drafts from Barrie were at first drawn in the name of J. S. Wilson & Co., and after in the name of Wilson, Moul & Co. * * The name of J. S. Wilson & Co. was used at first because that was a name known to the banks at Hamilton. It was used to the first of March, and after that the name Wilson, Moul & Co. was used."

Now, as McCarty had no authority from his partners to bind them by this note, on what principle are they to be

held bound? If the note had been made for partnership purposes, and within the legitimate exercise of McCarty's power as one of the firm, I do not dispute the position that Wilson and Moul having originally agreed that the name should be Wilson, Moul & Co., although that agreement was known only to the partners themselves, might be bound by the note. I do not say that I am entirely satisfied that under the decisions they would be held to be bound; but it may be conceded that they would, without affecting the view which I take of the present case. In that case their liability would arise from contract or agreement. It is clear that there was no agreement either express or implied which authorized the act of McCarty in the present case. If bound by McCarty's act, it is by estoppel, and not by agreement.

In *Hogg v. Skeen*, 18 C. B. N. S. 426, the law is thus stated by Mr. Justice Willes, at p. 432: "The reason why, in the case of a partnership, a party is bound by an acceptance which is not his own, but that of his co-partner, is a reason founded on estoppel in *pais*. Having consented to the exercise by another of an apparent authority to accept bills so as to bind him (even though such authority has been fraudulently exercised), as against a person who has taken the bill *bonâ fide*, and without notice of the fraud, the acceptor is estopped from denying the acceptance."

In 2 *Smith's L.C.*, 6th ed., p. 769, in the note to the *Duchess of Kingston's Case*, this judgment of Mr. Justice Willes is cited as the authority for the statement that the rule in question is founded on the law of estoppel in *pais*; and the general rule respecting estoppel, which is stated in connection with it, is that laid down by Lord Denman in *Pickard v. Sears*, 6 A. & E. 474, viz., "That where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

It is unnecessary to notice the slight qualification of this rule in *Freeman v. Cooke*, 2 Ex. 654, or the further qualification in *Cornish v. Abington*, 4 H. & N. 549, where it was held that the representation, if acted on, estopped the party making it, whether he intended it to be acted on or not.

The rule, as established by the two cases of *Pickard v. Sears* and *Freeman v. Cooke*, has repeatedly been affirmed as now governing, as in *Simpson v. Accidental Death Co.*, 2 C. B. N. S. (per Williams, J.) at p. 289; *Clarke v. Hart*, 6 H. L. Cas. (per Lord Chelmsford), at p. 656; *Swan v. North British Australasian Co., Limited*, 2 H. & C. 175; *Re Bahia & San Francisco R. W. Co. v. Trittin*, L. R. 3 Q. B. 584.

In my opinion if the defendants in this case are held liable, it must be by the application of this rule of estoppel.

I do not stop to cite authorities for the proposition that a partner can only bind his co-partners by a bill or note signed in the partnership name. I do not understand that proposition to be disputed.

The question now to be considered is, what was the name which, on the 30th January, 1874, these plaintiffs had a right to assert as against these defendants as being the partnership name—a question which, under the facts in evidence, really comes to this: Can these defendants be bound by estoppel as against these plaintiffs, by a name which never had an existence except by virtue of a verbal agreement that was never acted on, and which agreement was known only to the partners themselves; while at the same time another name was used as the partnership name, and while the business of the partnership was, and had always been, done in the other name?

In *Kirk v. Blurton*, 9 M. & W. 284, Lord Cranworth, then Rolfe, B., at p. 289, says: "The law seems to be perfectly reasonable; it implies no authority to bind the partnership in any other name than *that held out to the world* as the name of the firm."

If I am right in holding, as I do hold, that these defendants can only be bound by estoppel, and if the principle on which the cases of *Pickard v. Sears* and *Freeman v. Clarke* are decided is to govern, the question seems to become too clear for argument. The plaintiffs were never induced to act on the faith of McCarty being entitled to use a name which they had never heard ; and the defendants cannot be held to have represented by any word or conduct that the name of the firm was any other than that which was in use, and which only was kept before the public.

The reason for holding in the Court below that the note was made in the name of the firm is thus given in the judgment pronounced : " There is as much evidence of the name of Wilson, Moul & Co. being the proper name of the partnership, as that the name of J. S. Wilson & Co. should have been used ; for although Wilson understood the latter name was to be used, because better known, Moul knew nothing of that, and thought the name of Wilson, Moul & Co., was to have been used, which was the real and proper partnership style."

The fallacy of this seems to me to consist in making the test the original agreement, which remained in the bosoms of the partners, and was never, as far as shewn, communicated to any one else, instead of acts done or representations made by which the state of things was held out to the world.

It is losing sight of the important fact, that by their agreement McCarty had no right to make the note, and would have had no right to make any note. There was no agreement that McCarty should sign the name of Wilson, Moul & Co., or of J. S. Wilson & Co. either, to any such paper. The judgment further seems to misconceive the agreement, even if that was to govern the case. The evidence scarcely warrants the statement that there ever was an *agreement* that Wilson, Moul & Co. should be the real and proper partnership style. All that is, shewn is that that was the name talked of and intended at a time when nothing sug-

gested any other name—not that it was adopted as preferred in comparison with any other, or from any distinct desire to have that name. But, even if that had been so, the result of the evidence is that the name, before being ever used, was changed by an agreement which was carried into actual effect. It is true that Moul was absent when the other partners adopted the new name; but his ratification of their act appears by his expressing no dissatisfaction with it, and by the fact that the name J. S. Wilson & Co. continued to be used for some time after his return; whence, by a familiar rule of evidence, the change of name to J. S. Wilson & Co. was the act of all three.

The argument as to estoppel has two branches, and although in one or both branches the agreement of the partners becomes a subject for consideration, yet the liability to the plaintiffs is in either case only by estoppel. The one position is that the agreed name as between the partners was “Wilson, Moul & Co.” but the only name held out to the world was J. S. Wilson & Co.” In that case I hold that McCarty was never held out to the world as authorized to sign any name but “J. S. Wilson & Co.” and therefore could not bind his partners by the name of “Wilson, Moul & Co.” by any note made in fraud of them, whether he could or could not have bound them by that name by a bill or note given in a partnership transaction.

The other position is, that by agreement among the partners the name was changed to J. S. Wilson & Co., and that that was the only partnership name existing by agreement at the date in question. My opinion is strongly in favor of the latter view; but it may be questionable whether I am at liberty to insist upon it now, because, if the question were merely whether an agreement had been made to absolutely substitute this name, I apprehend that the judgment of the Court below would be conclusive.

The question of estoppel has most frequently arisen in partnership matters in cases in which an attempt has been made to make a nominal partner liable. A reference to some of the cases on this subject will show to how full an

extent the doctrine stated in *Pickard v. Sears* has been applied in partnership cases, both before that case was decided and down to the present time.

In *Waugh v. Carter*, 2 H. Bl., at page 246, Lord Chief Justice Eyre says : " Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners ; that A is to contribute neither labour nor money, and to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it to only two of them, to whom, without the others, they would have lent nothing."

In *Dickenson v. Valpy*, 10 B. & C. 128, at p. 140, 141, 142, Lord Wensleydale, then Parke, J., says : " Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. The plaintiff, therefore, must begin by shewing that the defendant stood in the situation of complete partner. He says, ' I can shew that, in the first place, because the defendant has represented himself to be so.' And if it could have been proved that the defendant had held himself out to be a partner, not ' to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that *the plaintiff* knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly

and in express terms that he was a partner, and the plaintiff had acted upon that statement. There is, however, no reason in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff as a partner. Therefore upon the ground of representation he is not liable. * * In those cases in which a plaintiff has not been induced by the defendant's representation *to give credit to him*, but seeks to fix him because he has *really authorized* the contract to be made, the plaintiff must shew that authority, and an authority upon condition not performed, is no authority at all."

In *Pott et al. v. Eyton*, 3 C.B. 32, Jones managed a shop for Eyton, paying him a percentage on the amount of all sales. Eyton's name was over the door, and licenses to sell tea, &c., were taken out in his name. Jones had other shops in the neighbourhood with which Eyton had no concern, and had an account in his own name at the plaintiffs' bank. The account was overdrawn, and it was sought to recover from Eyton the balance due to the bank, on the ground, amongst others, that he had held himself out as a partner with Jones. There was, however, nothing to shew that the bankers knew that Eyton's name was over the door of one of Jones's shops, or that licenses were taken out in Eyton's name, or that the bankers ever supposed him to be a partner with Jones, or that they had ever in fact given any credit to Eyton. The jury found that Eyton had not consented to have his name held out as a partner or to have his credit pledged to the bank, and the defendant had a verdict, which the Court refused to disturb, inasmuch as it appeared from the evidence that the bankers had looked only to Jones. I take this statement of the case from *Lindley on Partnership*, 3rd ed., vol. i., p. 51, where other cases on the same point are cited.

In *Reynell v. Lewis*, 15 M. & W. 517, Pollock, C. B. says, at p. 527: "The agency may be constituted by an express limited authority to make such a contract, or a

larger authority to make all falling within the class or description to which it belongs, or a general authority to make any ; or it may be proved by shewing that such a relation existed between the parties as by law would create the authority ; as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it ; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency ; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such ; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound ; he is estopped from disputing the truth of it with respect to that contract ; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt ; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the Judge."

The law stated in these cases seems to me fully to sustain my conclusion that the name by which alone McCarty could, in fraud of the defendants, bind them by his signa-

ture was J. S. Wilson & Co. as, being the only name held out to the public.

But even if my conclusion is wrong, it does not follow that the plaintiffs in this case can succeed.

To establish the estoppel the plaintiffs have to shew that they relied on the apparent authority of McCarty, and were by that means led to "change their previous position"—that, in short, they took this note and gave value for it because they relied on McCarty having authority as a partner of the firm to sign the note.

The cases I have quoted shew that evidence of holding out a certain state of things "to the world" is only evidence from which it may be inferred that the representation came to the plaintiff's knowledge. The fact to establish is that it did come to his knowledge, and that he acted in reliance upon it. There is in this case no room for such an inference. Even if the partnership name were Wilson, Moul & Co., what did the plaintiffs know? They neither knew who constituted the firm (which might not be essential), nor that McCarty was a member of the firm, nor that McCarty signed the note. They took the note, not relying on McCarty's authority to sign it, but relying on McCarty himself as endorser.

The evidence is that of Mr. *Lockie*, the bank manager. He says: "When the note was brought to me, I did not think whether the note was signed by McCarty or not. I made no enquiry about the note, because I relied on McCarty. I did not enquire about the firm. I asked McCarty what they did and what the business was. I enquired because McCarty was interested in them." The last sentence means merely that seeing McCarty with a note payable to himself by Wilson, Moul & Co., he enquired what the business of that firm was.

I do not see on what principle the defendants can be estopped by any act of McCarty as their agent when the plaintiffs did not deal with McCarty in that character, did not know of his relation to the defendants, and did not know that he signed the note. It was in this respect

that at the trial I attached importance to the circumstance that the note was either not made in the handwriting of McCarty, or was made in a disguised hand so as to conceal from the plaintiffs that it was made by him.

This dilemma then suggests itself.

If the plaintiffs were ignorant, as I am satisfied from the evidence they were, of the fact of McCarty being a partner, no estoppel arises. If they knew that he was a partner, they had notice that the transaction was not a *bonâ fide* partnership transaction, by the circumstance that the note was payable to himself.

Leverson v. Lane, 13 C. B. N. S. 278 was decided on the principle stated in *Smith's Mercantile Law*, 8th ed., p. 45, and in *Bayley on Bills*, 6th ed., 65, and *Byles on Bills*, 11th ed., 46. viz., that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.

The case *Ex parte Darlington District Joint Stock Banking Co., Re Riches*, 4 DeG. J. & S. 581, decided by Lord Westbury, is a strong authority to the same effect.

In *Frankland v. McGusty*, 1 Knapp's P.C., p. 274, Sir John Leach, then Master of the Rolls, says, at p. 301, "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction which may afford the separate creditor a reasonable ground of belief, that the security so given in the partnership name is given with the consent of the other partners; and those circumstances occurred in the case which was cited, and

which seemed to be inconsistent with the other authorities. I refer now to the case of *Ridley v. Taylor*, 13 East 175. In that case the bill was dated eighteen days before its delivery by the partner to his separate creditor, and it was not known by the creditor that it was drawn and endorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The Court therefore were of opinion, that there was reasonable ground for the separate creditor believing it not to have been given to him in fraud of the partnership, and that the general presumption, that a partnership security when applied in payment of a separate debt is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion. Upon a consideration therefore of all the authorities, I am of opinion that the law is, that, taken *simpliciter*, the separate creditor must shew the knowledge of the partnership; but if there are circumstances to shew a reasonable belief that it was given with the consent of the partnership, it lies upon the partners to prove the fraud."

In my opinion the defendants are not liable, and the appeal should be allowed with costs.

*The Court being equally divided,—judgment
in the Court below affirmed.*

WILLING V. CURRIE.

Sale of goods—Contract by telegrams.

Defendant, living at St. Marys, on the 24th of September, 1873, telegraphed to the plaintiff at Forest: "Can you ship three cars Treadwell wheat this month at \$1.20. Reply." On the same day the plaintiff answered: "Will accept your offer, three cars Treadwell, one dollar twenty." On the 25th defendant enclosed a shipping bill to plaintiff, asking him to ship the wheat as soon as possible. This bill was a printed form in use on the Grand Trunk Railway, filled up for the three cars, addressing them to the Royal Canadian Bank, Montreal. On the next day, hearing that the Railway Company had been inserting the words "at owner's risk of delay" in their shipping bills, the defendant telegraphed to the plaintiff that he could not take the wheat if the plaintiff allowed these words to be put in. The agent of the railway, however, insisted on inserting these words in the bill of lading, and the plaintiff sent the wheat forward, and drew upon the defendant with the bill of lading attached to the draft, which the defendant refused to accept, and the wheat was sold by the bank. The plaintiff thereupon sued for goods bargained and sold.

Held, that the two telegrams of the 24th and the letter of the 25th of September did not form a binding contract; that the terms of the shipping note were to be considered as part of the bargain; and that the plaintiff therefore could not recover.

DECLARATION on the common counts, for goods bargained and sold, goods sold and delivered, work and materials, money lent, money paid, money had and received, account stated, and for interest.

Pleas: never indebted, and payment.

The cause was tried at the last Spring Assizes, held at Stratford, before Wilson, J., without a jury.

The plaintiff, to prove the contract, put in the following documents: 1. A telegraph from the defendant at St. Marys, dated the 24th of September, 1873, as follows:—

"To M. Willing, Forest.

"Can you ship three cars Treadwell this month, at dollar twenty, (\$1.20). Reply.

"W. CURRIE."

2. A reply of the plaintiff from Forest, dated the 24th of September, 1873, as follows:—

"To W. Currie, St. Marys, "

"Will accept your offer, three cars Treadwell, one dollar twenty.

"M. WILLING."

3. A letter from the defendant to the plaintiff, dated St. Marys, 25th of September, 1873, as follows:—

“ M. Willing, Esq., Forest, Ont.

“ Sir—Enclosed I send you shipping bill for three cars Treadwell wheat bought from you last night at \$1.20, which please ship as soon as possible. Of course this must be shipped this month and the weight must be right.

“ Yours truly,

“ W. CURRIE.”

The shipping bill, as it was called, appeared to be a printed form such as was in general use on the Grand Trunk Railway. The important part of it read as follows:—

“ Forest Dale, 27th September, 1873.

“ The Grand Trunk Railway will please receive the undermentioned property, in apparent good order, addressed to *the order of the Royal Canadian Bank, Montreal*, to be sent by the Grand Trunk Railway Company of Canada, subject to the terms and conditions stated above and upon the other side, and agreed to by the shipping note delivered to the company at the time of giving this receipt.

“ *1050 bushels Treadwell wheat in bulk,*

more or less.

“ *63000. lbs weight.*

“ *Cars No. (298, 388, 5136).*

“ *(At owner's risk of delay).*

“ WM. CURRIE, Consignor.”

The words and figures in italics were written by the defendant. The words in brackets were inserted by the agent of the railway at Forest.

The defendant said that he had heard that the railway people had been inserting the words “at owner's risk of delay” in the shipping bills, and that the parties to whom he had sold the wheat had refused to receive it on those terms. He thereupon, on the 26th of September, sent the plaintiff the following message by telegraph:—

"M. Willing, Forest.

"I can't take your wheat if you allow the words, "at owner's risk of delay" put on shipping bill. Reply.

"W. CURRIE."

The plaintiff said when he received the telegram the words objected to were not in the shipping bill. He commenced to ship the wheat about 6 A.M. on the 27th of September, at Forest; he had not, at that time, received the telegram of the 26th, and did not get it till about 8 A.M. of that day, when he had two cars of the wheat loaded. On getting it he went to the agent of the railway at Forest, but he refused to ship the wheat on any other terms than by putting "at owner's risk of delay," on the shipping bill. After loading the third car he took the shipping bill the defendant had sent to him to the agent of the railway, and he put on it the date, the number of the cars, and added the words "at owner's risk of delay." Plaintiff objected to the words being added, saying that the defendant did not want these words in, but he said he would not ship unless in that way. He got from the agent of the Company a bill of lading stating that they had received the wheat from the defendant, and it contained also the words "at owner's risk of delay." He attached this to a draft on the defendant and left it with the bill at the bank, where the draft was discounted. The draft was drawn on the 27th of September and was protested for non-acceptance on the 16th of October. The three cars did not leave the station for Montreal until the 10th of October. The wheat was sold in Montreal by the bank and the proceeds applied towards paying the bank. The difference between the price the plaintiff was to have received and the net proceeds of the sale in Montreal was \$134.61.

There was a further correspondence between the plaintiff and the defendant as to accepting the draft. Defendant agreed to do so if the plaintiff would guarantee him against loss that he might suffer from the detention. This the plaintiff declined to do. The defendant refused to accept his draft, which was protested.

The learned Judge was at first inclined to think that the two telegrams and the letter of the 25th of September made out a contract for the sale of the wheat, and that the shipping bill sent might be considered the defendant's directions to the plaintiff as to how he wished the grain shipped; that if the plaintiff disobeyed his instructions in this matter he might be liable to the defendant in another form of action, perhaps only for nominal damages, but that that would not prevent the plaintiff from recovering any damages he might have sustained in consequence of the defendant refusing to receive the wheat.

On reflection, however, he thought the plaintiff had failed to make out a binding contract to take the wheat except on the terms of the shipping bill sent by the defendant to him in his letter of the 25th of September. He therefore entered a verdict for the defendant, with leave to the plaintiff to enter a verdict for him for \$164.61, and leave to amend his declaration in any form that might be necessary according to the facts, as he might be advised.

In Easter term, May 18, 1874, *Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a verdict for the plaintiff pursuant to the Law Reform Act, on the ground that the sale of goods by the plaintiff to the defendant was proved as alleged, and that the plaintiff, under the law and evidence, was entitled to recover; and for leave to the plaintiff to amend his declaration by adding a special count for not accepting the wheat in question, or otherwise, as might be necessary.

In Michaelmas term, Dec. 4, *Ferguson* shewed cause, and referred on the point as to whether the letters and telegrams or not shew a contract: *Webb v. Sharman* 34 U. C. R. 410; *Carter et al. v. Bingham*, 32 U. C. R., 615; *McGiverin v. James et al.*, 33 U. C. R. 203; *Harty v. Gooderham*, 31 U. C. R. 18; *Benjamin on Sales*, 2nd ed., 32, 35, *Proprietors, &c., of the English and Foreign Credit Co., Limited v. Arduin*, L. R. 5 H. L. 64, 70.

Robinson, Q. C., contra.

December 22, RICHARDS, C. J., delivered the judgment of the Court.

None of the cases that we have looked at decide that these two telegraphic messages between the parties of the date of the 24th of September shew a completed binding contract between them.

The message sent by the defendant to the plaintiff is merely one of inquiry. We can imagine a merchant being placed in a position to make it of great importance to know if he can get a certain quantity of produce at a certain price. He may either personally, in writing, or by means of the telegraph apply to any one dealing in the article to know if he can supply him with the quantity he needs and at a certain price, but this surely does not bind him to take it; something more is needed if the other is willing to sell on the agreed terms.

The reply, "I will accept your offer, three cars Treadwell, one dollar twenty," if held to make the bargain a complete and binding one, would always leave a party making inquiry if he could get from the person selling the goods an article at certain price at the mercy of the party owning the goods.

It would embarrass mercantile transactions very much if a merchant, in order to see if it would be prudent for him to accept an offer or not, could not inquire of another party in the same trade if he could supply him with a certain quantity at a certain price, without being considered as bound by that inquiry as an offer.

He might make these inquiries of several different parties residing in different places, and his determination to purchase from any might depend on the answers he received from each. If one stated he could not supply him with the quantity he sought, he might be compelled to decline the contract he was about to enter into, and which was the inducement to him to make the enquiries. The failure to obtain the quantity he expected to get from one alone might render it impossible for him to deliver the whole quantity which his proposed contract called for. He might, therefore, as a prudent man, not consider him-

self to be in a position to buy from any of the parties of whom he had been making enquiries as to whether each one could furnish him with a certain quantity at a certain price.

Yet if we were to decide that an acceptance of such an inquiry, considering it as an offer in the terms in which it has been accepted here, we would permit the person to whom the inquiry was addressed to make a contract which might be injurious to the party making the inquiry, when he never supposed he would be bound in the event of the party saying he could furnish the goods at the price and in the manner inquired about.

I do not think we can make a contract out of the two telegraphic messages of the 24th of September.

But what would that contract be? Its effect, as I understand it, would be that the goods had been sold to the defendant, and the plaintiff had a lien for the price. The plaintiff would not be bound to draw on the defendant for the amount, and certainly would not be bound to allow the bill of lading to be taken in the name of the defendant, so as to be under his control, and the plaintiff to rely merely on the contract for his pay. It was not pressed in this view at the trial, nor do I think it can reasonably be so considered here that this was what either party intended. The defendant certainly did not contemplate that the wheat was to be shipped by the plaintiff in his, the plaintiff's, name, and subject to his lien, or he would not, without explanation, have sent a shipping bill consigning it to his own bankers in Montreal and in his own name. Nothing is said in the previous communications as to the goods being sent forward in this way.

If, therefore, the plaintiff would not have been bound to do this, and the defendant expected and intended this should be done, it is obvious that they had not made a finished and completed agreement by the two telegraphic messages.

When the plaintiff received the defendant's letter of the 25th of September he was quite at liberty to say, "I decline

shipping this wheat in your name consigned to your banker in Montreal;" and if he were at liberty to do this, defendant was equally at liberty to say, "These are the terms on which I propose to buy your wheat. If you decline them, I cannot take it."

It may be contended that the words inserted in the shipping bill, "at owner's risk for delay," were to the same effect as the third condition on the shipping bill sent by the defendant himself, that the Company would not be liable "for damages occasioned by delays from storms, accidents, over-pressure of freight, or unavoidable causes, or for damages from the weather, fire, heat, frost, or delay of perishable articles, or from civil commotion."

The defendant says the parties to whom he had sold the wheat would not receive it on a bill of lading containing the words "at owner's risk of detention" unless he would give a guarantee to make good any loss by detention. The objection, therefore, as far as he was concerned, does not appear to have been a mere pretence to get out of a bad bargain.

If the terms of the shipping bill are fairly to be imported into the final bargain between the parties, and we think they are, then the plaintiff did not comply with those terms, though having ample notice before he finally shipped the wheat that the defendant would not accept the wheat if he allowed the words objected to to be inserted in the shipping bill.

On the whole, we think the finding of the learned Judge was right, and that the verdict for the defendants ought not to be disturbed.

Rule discharged.

PRONGUEY V. GURNEY ET AL.

Trade fixtures—Right to remove—Estoppel—Pleading.

The weight of authority is, that a tenant may remove trade fixtures which he might have removed during the term, if he remains in lawful possession after the end of the term, holding possession of the premises under a right still to consider himself a tenant.

Declaration, that defendants being in possession of certain premises, (described), as tenants of the plaintiff, wrongfully pulled down and carried away certain fixtures.

Plea: that the premises were occupied by defendants as scale makers, having long before been let to defendants and others for carrying on their trade; that defendants and others, for such purpose, during their tenancies, put up the fixtures, (describing the fixtures put up by each), and the others, during their tenancies, sold and conveyed their part of the fixtures to defendants, who took possession thereof and used them on said premises in their trade; and being so possessed, they, during their tenancy, pulled down and carried away said fixtures, doing no unnecessary damage.

First replication, as to the fixtures put up by the others, that they were not severed or removed during the tenancies of the parties who affixed them, *nor for a long time afterwards.*

Held, that the replication was bad, for if defendants owned the fixtures and removed them whilst in possession of the premises with a right to consider themselves tenants, the delay to remove them "for a long time" would make no difference. *Held*, also, that the plea was good.

There was an equitable rejoinder which is set out below, the validity of which was not decided.

Second replication: that the fixtures were so affixed to the buildings on the demised premises that they could not be removed without injury to the freehold. Rejoinder: that they were such trade fixtures as in the plea alleged, and were removed without causing more injury to the freehold than was permissible by the laws of Ontario concerning fixtures.

Held, that the replication and rejoinder were both good: that it might be a mixed question of law and fact, whether the alleged fixtures were so attached that they could not by law be removed; and that the rejoinder might be considered as an informal joinder of issue.

The third replication set up, by way of estoppel, a surrender in law by defendants of the premises to one C., the then owner in fee, and an acceptance of a new lease from C., and that C. afterwards conveyed in fee to the plaintiff, who then saw the new lease, and was informed and believed that the said fixtures formed part of the freehold; and that defendants afterwards became plaintiff's tenants. Equitable rejoinder, that before the conveyance by C. to the plaintiff, the plaintiff knew that defendants were in actual occupation, claiming and using all said fixtures as their own, and was told by C. that he did not own or claim them, and only sold to the plaintiff the premises without them; and that the plaintiff by reasonable care could have obtained full information from defendants, but negligently omitted to do so. *Held*, that the replication was good, and the rejoinder bad.

DEMURRER.

Declaration: that the defendants, at the time of the committing of the grievances hereinafter complained of, being in possession of all and singular that certain parcel

or tract of land and premises situate, lying and being in the City of Hamilton, in the County of Wentworth, being composed of part of lot two, on the east side of James street, between Cannon and Gore streets, as described on McKenzie's map of said City of Hamilton, which said land and premises were otherwise known as Gurney's Scale Works, as tenants of the said plaintiff, and during the said tenancy, wrongfully committed waste to the said lands and premises by pulling down certain buildings erected thereon, and the fixtures belonging to the said buildings attached thereto—that is to say, bricks and mortar, engines, boilers, pulleys, rods, shafting, belting, doors, and bake-ovens, and carried away and disposed of the same to their own use.

Plea: As to the pulling down of the doors of one of the bake-ovens in the declaration mentioned, and of one of the boilers and engines, and the pulleys, rods, shafting, and belting appurtenant thereto, all which above specified premises form parcel of the fixtures in the declaration mentioned, and as to the carrying away and disposing of such parcel of such fixtures to the defendant's own use, as is alleged, and as to the pulling down small portions of the said bake-oven in the introductory part of this plea mentioned, and of the buildings in the declaration mentioned—that the defendants before and at the said times when, &c., mentioned, were lawfully possessed of the said lands and buildings erected thereon in such declaration mentioned as tenants thereof to the plaintiff, as in such declaration mentioned, and long before, and at such said several times when, &c., had carried on, in, and upon the said buildings and lands the trade and business of scale makers, the said lands and buildings having before any of those times when, &c., been let and demised to the defendants and other tenants of such demised premises previous to the defendants, for the purpose of the defendants and such others, tenants of such demised premises previous to the defendants, using, exercising, and carrying on their several trades and businesses

therein as aforesaid; and that the defendants and the said others in the course of their said trades and businesses, and for the purpose of carrying on the same in and upon the said demised premises, during their said tenancies, before the said times when, &c., in such declaration mentioned, set up and erected in and upon the same, the defendants the said one bake-oven in the introductory part of this plea mentioned, and the said door thereof, together with other the more valuable portion, and the said others the residue of such parcel in the introductory part of this plea mentioned of such fixtures in the said declaration mentioned, in a due, careful, usual, and proper manner, and in such a manner that the same could be removed without doing extensive or substantial damage to the said demised premises, and doing as little damage as possible to the said demised premises upon such occasions: that long before the said times when, &c., the said others for valuable consideration, and during their said tenancies, bargained, sold, delivered, and assigned to the defendants, all their said portion of the said parcel in the introductory part of this plea mentioned of the said fixtures in the declaration mentioned; and the defendants then, and before any of the said times when, &c., in the declaration mentioned, took possession thereof, and then and thenceforth used the same as their own property in the course of the defendants' said trade and business in and upon the said demised premises: that the defendants being so possessed as of their own property of the said parcel in the introductory part of this plea mentioned of the said fixtures in the declaration mentioned; as such trade fixtures of the defendants as aforesaid, and also being so as aforesaid possessed of the said demised premises, and using, exercising, and carrying on the defendants' said trade and business therein, the defendants during the said tenancy, to wit, at the said times when, &c., in the declaration mentioned, did pull down and carry away and dispose of to their own use the said parcel in the introductory part of this plea mentioned of the said fixtures in the said declaration mentioned, and so

doing did necessarily and unavoidably a little pull down a little of the said bake-oven in the introductory part of this plea mentioned, and of the said buildings erected upon the said lands in the declaration mentioned, as the defendants lawfully might for the cause aforesaid, doing no unnecessary damage to the said demised premises on those occasions, which are the grievances in respect of which this plea is pleaded.

Replications. 1. To so much of the plea as relates to the said fixtures alleged by the defendants to have been fixed to the said demised premises by others, tenants of the said demised premises, during their tenancies, and purchased by the defendants from such others—that the said fixtures were not severed or removed from the said demised premises during the term of the tenancies of the tenants so affixing the same, nor for a long time afterwards, whereby the defendants lost any right they might have had to remove the said fixtures, and the said fixtures ceased to be the property of the defendants, and became parcel of the freehold of the said demised lands and premises, and as such were afterwards conveyed to and became the property of the plaintiff before the committing of the grievances in the declaration alleged.

2. That the said fixtures were so affixed to the buildings on the said demised premises that the said fixtures could not be, and were not, removed by the defendants without injury to the freehold of said demised premises.

3. That after the several matters in the introductory part of the said plea described had been affixed to the said demised premises, and after the defendants had purchased the trade-fixtures in said plea alleged, and while all of the said fixtures in said plea described were fixed and attached to the buildings on said demised lands and premises, and before the committing of the grievances in the declaration alleged, the said defendants, being in possession thereof, made a surrender in law of the said demised lands and premises, with the said fixtures thereto attached, to one C. M. Counsell, the then owner of

the inheritance in fee simple of said lands and premises, and the defendants Edward Gurney and Charles Gurney after such surrender accepted and received from the said C. M. C. a lease of said lands and premises, with the said fixtures thereto attached, and all of the defendants hereto afterwards acknowledged and confirmed the said lease; and the said plaintiff afterwards, and while the said fixtures remained and were fixed and attached to the buildings on said lands, and before the committing of the said grievances, purchased from the said C. M. C. the inheritance in fee simple of said lands and premises, and the appurtenances thereunto belonging, and obtained a conveyance thereof from the said C. M. C.; and at the time of the delivery of such conveyance to the plaintiff, the said lease from the said C. M. C. to the defendants E. G. and C. G., and the acknowledgment thereof by all of the said defendants, were shewn to the said plaintiff, and transferred to him, and he was then informed and believed that the said several matters in the introductory part of said first plea described were appurtenant to and formed part of the freehold of said lands; and the defendants hereto afterwards became tenants of the plaintiff of the said demised land and premises. And the plaintiff claims that, by reason of the premises, the said defendants are estopped and precluded from setting up any right in themselves to the several matters in the introductory part of the said first plea described.

The defendants took issue upon the plaintiff's first replication to part of the defendants' plea, and upon the plaintiff's second and third replication to defendants' said plea.

Second rejoinder to the said first replication of the plaintiff to the therein specified part of the defendants' said plea, upon equitable grounds: that the said fixtures in the replication mentioned, and concerning the severance and removal whereof by the defendants that replication is replied, were severed and removed from the said demised premises in that replication and in the defendants' said

plea in that behalf mentioned as in that plea in that behalf alleged, within a reasonable time after the expiration of the terms of the said tenants from whom the defendants purchased the same as in such replication mentioned; and that at the time of the purchase by the defendants of the said fixtures from the said tenants the defendants also obtained from those tenants assignments of their leases in that behalf, and the defendants thereupon, during the continuance of the said leases and of the said terms, were duly admitted by those through whom the plaintiff claims such demised premises, as in such replication alleged, and went into possession and occupation as tenants of the said demised premises with the knowledge and consent of those through whom plaintiff so claims such demised premises, and under and by virtue of the said assignments to them of such leases; and the defendants thereupon, and before the conveyance to the plaintiff of the said demised premises as in his said replication alleged, paid rent in that behalf to those through whom the plaintiff so claims such demised premises, and they then accepted and received such rents; and the defendants, from the time of their so becoming such tenants of those through whom the plaintiff so claims the said demised premises, until the time of the said severance and removal by the defendants of the said last above mentioned fixtures, continued, as the plaintiff well knew and had notice, in such possession and occupation of such demised premises without waiving, surrendering, or in any manner releasing or destroying the right of the defendants to such fixtures so by them purchased and obtained as in such first plea mentioned, and in and by that replication admitted.

Rejoinder to the second replication of the plaintiff to defendants' plea: that the fixtures in such second replication mentioned were such trade-fixtures as in the said first plea in that behalf alleged, and could be and were removed by the defendants as in such plea in that behalf alleged without thereby causing more injury to the freehold of the therein mentioned demised premises than at

the said time when, &c., was permissible by the laws in force within the Province of Ontario concerning the removal of such trade-fixtures.

Rejoinder to the third replication of the plaintiff to the defendants' said plea upon equitable grounds: that before and at the time of the sale and conveyance of the demised premises in that replication mentioned by the said C. M. C. to the plaintiff as in such replication mentioned, the defendants were, and the plaintiff had notice and knowledge that the defendants were, in the actual and visible possession and occupation of the said demised premises, and claiming and using as their sole and exclusive property all the said trade fixtures in said first plea and in that replication mentioned; and was told and informed by said C. M. C. before and at the time he so sold and conveyed to the plaintiff, that said C. M. C. was not and did not claim to be and never claimed to be the owner of such trade fixtures, and that he only sold to the plaintiff and only received purchase money from him for the said demised premises without such trade fixtures. And the defendants further say that the plaintiff and the said C. M. C. and the defendants were, before and at the time of the said sale and conveyance of such demised premises to the plaintiff by said C. M. C., residing in the City of Hamilton, in the Province of Ontario, and well known to each other, and the said plaintiff, by using reasonable care and diligence, could have obtained from the defendants full and true information concerning the premises, which the defendants were always ready and willing to give to the plaintiff; but the plaintiff, well knowing the premises, carelessly and negligently omitted so to do, and never made any attempt to obtain any information in that behalf from the defendants or any of them.

Demurrer to the second rejoinder, on the grounds:—

That it is pleaded upon equitable grounds, but discloses no facts entitling the defendants to relief upon equitable grounds.

That it confesses without avoiding the allegations in the replication to which it is pleaded.

That it does not shew that the defendants remained in possession of the said lands and premises set forth in the declaration, as tenants thereof, from the time of the assignment of the lease to the defendants from other tenants of said demised premises until the committing of the grievances in respect of which the said rejoinder is pleaded.

That it confesses that the fixtures in respect to which it is pleaded were not removed or severed from the freehold of the demised lands during the term of the tenants who annexed the said fixtures to the said demised lands, and discloses no right in the defendants to remove them after the said time had expired.

Demurrer to the third rejoinder, on the grounds:—

That it amounts to a joinder of issue to the plaintiff's replication.

That the defendants have attempted to put in issue to be tried by a jury a matter of law, that is, the laws in force concerning the removal of trade fixtures.

That it is evasive, argumentative, and uncertain.

Demurrer to the fourth rejoinder, on the grounds:—

That it is pleaded upon equitable grounds, but discloses no facts entitling defendants to relief upon equitable grounds.

That it is pleaded to the whole replication, but is no answer to the said surrender of said lands, and of the said fixtures thereto attached, by the said defendants to C. M. C., the then owner in fee of said lands, and the acceptance and receiving by the said defendants, E. and C. G., from said C. M. C. of a lease of said lands with the said fixtures attached, and the acknowledgement and confirmation by all of said defendants of said lease from said C. M. C., and of the purchase by the plaintiff from and the conveyance to him by said C. M. C. of the inheritance in fee simple of said lands and premises, and the appurtenances thereto belonging, while the said fixtures remained, and were fixed and attached to the said lands, and the shewing and transferring to the plaintiff by said C. M. C.

(at the time of delivery of said conveyance) of the said lease and the said acknowledgment thereof, and that the defendants afterwards became tenants to the plaintiff of said lands and premises, as set forth and alleged in the said replication of the plaintiff.

The defendants joined in demurrer, and excepted to the replications, on the grounds :—

1. As to such first replication, because the declaration only complained of alleged improper pulling down and removal by defendants after they became plaintiff's tenants of the *locus in quo*, and during their term, of buildings and fixtures as if they were ordinary irremovable fixtures and parts of the freehold, and not trade fixtures removable by the tenant, and as if the defendants were ordinary and not trade tenants of the plaintiff of the *locus in quo*; and because such first plea shews in substance and by necessary implication that what was so pulled down and removed by the defendants were their own trade fixtures, which they as such trade tenants, and with as little damage as possible, and without extensive or substantial damage to property, and within a reasonable time removed, and also how and under what circumstances all so pulled down and removed became and were such trade fixtures of the defendants as such trade tenants—viz., as to the greater part by being put in originally by defendants themselves as such trade tenants in the ordinary way, and as to the residue, that they were trade fixtures belonging to and originally put in the *locus in quo* by prior trade tenants, and by them sold, assigned, and delivered during their tenancies to the defendants, and then, to wit, from the time the same so became the goods, chattels, and trade fixtures of the defendants until, and at, and after the expiry of the terms of those original trade tenants taken and used by the defendants as their trade fixtures in their trade in and upon their demised premises; and because such first replication impliedly admits all that, and confining itself to that portion of the removed trade fixtures which was originally put in by those older trade tenants of the *locus in quo*,

urges as a defence that the same were not so severed or removed by defendants in manner aforesaid until after the terms of those older trade tenants had terminated, a point wholly immaterial, and which cannot rebut or invalidate the defence shewn in that behalf in such first plea.

2. As to such second replication, because it admits the truth of the first plea in all respects, and thus in effect that, all in dispute were both removable and removed as therein alleged without doing extensive or substantial damage to the said demised premises, and doing as little damage as possible to said demised premises, but urges as a defence that notwithstanding all that, they neither could be nor were removed without to some trifling extent, no matter how little, doing some injury to the *locus in quo*, a point wholly immaterial, and which can not rebut or invalidate the defence in that behalf shewn in such first plea.

3. As to the third replication, because all therein alleged is pleaded solely and merely by way of estoppel, and not in bar, and therefore, without disputing or confessing what is alleged in the said first plea, the plaintiff by his said third replication merely contends that defendants cannot be permitted to plead such a plea as their said first plea at all under the circumstances alleged in that third replication; when in truth nothing is in such third replication shewn which should debar defendants from their common law *primâ facie* right and privilege to plead such a plea, or which can or does privilege the plaintiff to decline to plead thereto in the ordinary way, such as demurring thereto or traversing or confessing and avoiding the same, especially as for all that appears in that third replication the plaintiff knew, and the fact was, that defendants always remained such owners as in the first plea alleged, and in the actual possession as such owners of all the defendants' said goods, chattels, and trade fixtures as in that first plea mentioned, and using and claiming them as such before and at the time of the purchase by the plaintiff of the *locus in quo*, as in his said third replication mentioned.

4. And because the defendants, such trade tenants of the

locus in quo, and entitled to their said trade fixtures therein as their own goods, chattels, and property as against their landlord, the said C. M. C., in the third replication mentioned, by merely during such their tenancy of such *locus in quo* obtaining from that landlord a longer lease, or merely a lease by deed instead of a verbal one in the very same identical terms, of the *locus in quo* merely, and not of said goods, chattels, and trade fixtures of the defendants, would not, by so merely obtaining from that landlord during the defendants' original tenure such subsequent lease, and so by operation of law surrendering the original by merging it in such similar later one, and without any intention or idea on the part of such tenants and landlord, or either of them, to in any manner alter the ownership or nature or removability of such trade fixtures, which for all that is alleged in such third replication is or may have been all that occurred between the defendants and C. M. C. in that behalf, thereby forfeit or justify the plaintiff in assuming that the defendants had thereby forfeited their goods, chattels, and trade fixtures, and changed them into said C. M. C.'s land and part of the *locus in quo*, which alone was purchased or intended to be purchased by the plaintiff from said C. M. C., or sold or conveyed by him to the plaintiff.

In Michaelmas Term, December 1, 1873, the demurrer was argued.

Duff, for the plaintiff. The equitable rejoinder should shew facts sufficient to entitle the plaintiff to an absolute and unconditional injunction in equity, and it does not: *Coulson v. McPherson*, 23 U. C. R. 129. The right to the fixtures is in the landlord: *Donkin v. Crombie*, 11 C. P. 601; *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Lee v. Risdon*, 7 Taunt. 189. The fixtures, even if put in by the tenant, are not removable by him, except during the tenancy: Year Book, 12 H. H. vii. 8; 21 H. vii. 27; *Thresher v. Company of Proprietors of the East London Water Works*, 2 B. & C. 608; *Colegrove v. Dios Santos*, 2 B. & C. 76; *Fitzherbert v. Shaw*,

1 H. Bl. 258. As to the third rejoinder, we rely on *Brunskill v. Mair*, 15 C. P. 213; *Wooley v. Hutton*, 33 U. C. R. 152. The rejoinder is bad, because it raises an improper issue before the jury—one of law. As to the fourth rejoinder, see *Lyon v. Reed*, 13 M. & W. 285.

M. C. Cameron, Q.C., and *R. Martin*, contra. If the rejoinder, on equitable grounds, fails to shew enough to obtain an injunction, but yet discloses a legal defence, it is sufficient as a plea at law. It is not correct to say that fixtures must be removed during the tenancy; the tenant may remove them after that if he is still in possession, and holds the premises under the right still to consider himself tenant. The rejoinders are substantially correct. They referred to *Penton v. Robart*, 2 East 88; *Fitzherbert v. Shaw*, 1 H. Bl. 188; *Leader v. Homewood*, 5 C. B. N. S. 546. *Roffey v. Henderson*, 17 Q. B. 473; *Stansfeld v. Mayor &c., of Portsmouth*, 4 C. B. N. S. 120; *Heap v. Barton*, 12 C. B. 274; *Martin v. Roe*, 7 E. & B. 237; *Pugh v. Arton*, L. R. 8 Eq. 326; *Sumner v. Brownlee*, 34 L. J. Q. B.; *Lancaster v. Eve*, 5 C. B. N. S. 717; *London and Westminster Loan and Discount Co. v. Drake*, 6 C. B. N. S. 798.

December 22, 1874. RICHARDS, C. J., delivered the judgment of the Court.

No doubt the question as to what kind of possession the tenant must have after the expiration of the lease to authorize him to remove fixtures is not very clearly settled. It is said he must hold the premises under a right still to consider himself a tenant. It may be that in this view he must be there with the assent of his landlord, and so his possession must be rightful and lawful.

It is suggested by Williams, J., in one of the cases, that he would then be a tenant at sufferance. But probably he would not be considered as a wrong-doer until the landlord had intimated by action, demand of possession, or entry on the premises, his intention of considering the tenant's possession as wrongful. The landlord no doubt could bring

ejectment without any notice to quit or demand of possession, as soon as the term created by the lease had expired. We doubt if after that the tenant could remove fixtures.

The old rule, that whatever is annexed to the soil must be considered as a part of the soil, and as soon as fixtures are so annexed they lose their character as chattels, seems inconsistent with the doctrine that when the tenant leaves the possession after the expiration of the term, without removing the fixtures, it is considered to be "a gift in law to him in reversion." The more logical conclusion would seem to be that having the right to remove the fixtures during the term, and having omitted to exercise the right the fixtures remaining as a part of the freehold belong to the owner of the freehold, or perhaps, as Chief Justice Cockburn suggests, it is a gift to the landlord of his right of removal of the fixtures: *London and Westminster Loan and Discount Co., Limited, v. Drake*, 6 C. B. N. S. 808.

But fixtures are considered as goods and chattels liable to seizure for debts due by the tenant, and if assigned by way of security the bill of sale, to be valid, must be registered.

If, however, there is an underlease of the property including the fixtures, then it is not considered to come within the operation of the Bills of Sale Act, for the right of the underlessee to the enjoyment of the property during the term in which it was demised to him is absolute: *Ex parte Barclay, In re Joyce*, L. R. 9 Ch. 576.

In *London and Westminster Loan and Discount Co., Limited, v. Drake*, 6 C. B. N. S. 798, where the tenant had mortgaged the fixtures and then surrendered the lease, it was held that the interest in the fixtures was such that the terms of the original lease would be held to be extended to protect the rights of the mortgagee, shewing that the fixtures were to be considered to a certain extent as partaking of an interest in the land.

We have made lengthy abstracts from many of the later cases to shew the views that seem to prevail. It may be as well to consider how the law stands, and then endeavour to apply it to the case before us.

In *Heap v. Barton et al*, 12 C. B. 274, the plaintiff being heir-at-law of the mortgagee, the mortgagor was allowed to remain in possession. He let the premises to defendants for £30 a year. Three years after the lease the plaintiff gave notice to defendants of the mortgage, and to pay the rent to him. The defendants attorned and continued to pay rent until 1851, when they disclaimed holding under him. On the 4th February, 1851, the plaintiff demanded possession, and served a declaration in ejectment, the demise being on the 5th February. On the 14th February the plaintiff, in consideration of defendants not appearing in the action, undertook not to issue a writ of possession until after 25th March. Defendants suffered judgment to go by default, and remained in possession until the 24th March, when they quit, having in the interval between 19th February and 24th March removed the articles mentioned in the declaration, which were tenant's fixtures, all affixed by the defendants during their term. No writ of possession had been executed:—Held, that the defendants were by the agreement precluded from removing fixtures in the interval between 19th February and 25th March, the fair construction of the agreement being that the premises were to be given up in the same state as when the judgment was signed.

There is a *quere* to the head note, whether the tenant has the right to remove fixtures after the expiration of his term, where he still continues in actual possession of the premises, whether by wrong or with the landlord's consent.

Jervis, C.J., said, p. 280: "The Courts seem to have taken three separate views of the rule,—first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them,—secondly, as in *Penton v. Robart*, 2 East 88, that the tenant may remove the fixtures notwithstanding the time has expired, if he remains in possession of the premises—thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz., that the tenant continues to hold the premises under a right still to consider himself as tenant." *Fitzherbert v. Shaw*, 1 H. Bl. 258, followed.

As a general rule, in the case of a freehold he has exactly the same interest in everything attached to the freehold as he has in the bricks and mortar themselves which make up the walls of the freehold. (See *dictum* of James, L. J., in *Ex parte Dalgish*, L. R. 8 Ch. 1080.) If so, when the tenant takes a new lease, it would seem to follow, in the absence of any exception that he leases, the fixtures that were then attached to the freehold, and cannot deny that they belong to the landlord.

In *Stansfeld v. The Mayor, &c., of Portsmouth*, 4 C. B. N. S. 120, the agreement was that certain machinery, &c., to be fixed on the premises, should not be removable at the expiration or determination of the term; then a proviso that the stipulation should not be construed to apply to any machinery, &c., which should be erected on the premises by the tenant during the term for any other purpose than carrying on the business of a shipwright, but it should be lawful for the tenant at any time during the term, and *at the expiration thereof*, to remove such last mentioned machinery from the premises. It was held that the assignees of the tenant had a right under the agreement to remove this last mentioned machinery within a reasonable time after the termination of the lease by the bankruptcy of the tenant. Most of the decided cases were referred to on the argument. Sir James Hannen, then Mr. Hannen, in argument, submitted that the proper view as to the tenant's right of removal was, that it exists only whilst he or his representatives continue in possession without any termination of the tenancy either actual or constructive.

In *Leader v. Homewood*, 5 C. B. N. S. 546, the plaintiff's lease expired in Michaelmas, 1857. He entered into negotiations for a new lease, but they failed, the landlord on 17th June declining to grant a new lease. His term being ended he at first declined to give up possession. On the 12th October he was served with a demand under the Common Law Procedure Act; on the following day he *quitted*, and was proceeding, with the landlord's consent, to

remove his goods, certain fixtures, some of which had been severed and others not, and other effects being still upon the premises. The plaintiff, on the evening of the 14th of October, went with a van for the purpose of taking them away, when he found the front door fastened; he then applied to defendant, who had formerly rented a portion of the premises under him, and had that day taken possession of the whole under an agreement for a lease from the superior landlord, for leave to enter and take the goods. The defendant refused to allow him to do so, saying, if he attempted to enter, he would give him into custody.

The plaintiff's counsel, in argument, said it would seem the landlord's right to the fixtures "depends on a presumption of law, that the tenant quitting the premises at the expiration of the term and leaving the fixtures behind him, intended to *bestow* them on his landlord, to whom they become a *gift in law*; and this, like some other legal presumptions, is perhaps not *capable of being rebutted*; but *Penton v. Robart* may be thought to shew that the presumption of gift arises, not immediately on the expiration of the term, but *on the tenant quitting the premises*, leaving the fixtures behind him."

During the argument Williams, J., said, at p.551: "Down to the time of *Penton v. Robart* the tenant's right to remove fixtures was considered to be limited to his term. That case however, and *Weeton v. Woodcock*, extend it to 'such further period of possession by him, as he holds the premises under a right still to consider himself as tenant.' That I take to be the present state of the law upon the subject."

The *dictum* of Patteson, J. in *Roffey v. Henderson*, 17 Q. B. 574, was referred to, as follows: "The general principle is, that when the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenant's fixtures, may remove them during the term, or during such time as he may hold possession after the term, in the capacity of a tenant."

Williams, J., said, "That is not inconsistent with a *tenancy on sufferance*."

The Court in that case reduced the damages by the amount applicable to the fixtures.

Willes, J., delivered the judgment. He said, at p. 553: "The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures usually called 'tenant's fixtures,' is by no means clearly settled. According to the older authorities, the rule was, that he must sever them during the term."

He then referred to *Penton v. Robart* and *Weeton v. Woodcock*, and said: "It is, perhaps, not easy to understand fully what is the exact meaning of the rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant."

The Court decided that case on the ground that the landlord had re-entered, and thereby put an end to the tenancy before the plaintiff attempted to enforce his right, and he could not maintain an action in respect of the defendant having prevented him from severing the fixtures, for at that time the plaintiff had ceased to be a tenant of any kind.

It was objected at the trial on the part of the defendant that it lay on the plaintiff to shew that the fixtures in question had been disannexed, and that no such evidence had been given. The jury found that the plaintiff had not intentionally abandoned the fixtures. In the judgment no distinction is made as to the fixtures that had been removed, if there were any such, so that on that point the judgment settles nothing.

In *Cornish v. Stubbs*, L. R. 5 C. P. 334,—where the tenancy was one determinable by a week's notice to quit and reasonable time after the expiration of the notice to enable the tenant to remove his goods,—Bovill, C. J., said, at p. 327: "It appears from *Coke upon Littleton*, s. 69, that the law will sometimes annex to a tenancy a right for a tenant to remain in possession of the land, after the determination of the tenancy, for the purpose of removing his goods."

He referred to *Stansfeld v. The Mayor of Portsmouth*, as to the right of the assignees of a tenant to remove his goods, both fixtures and chattels, within a reasonable time after the tenancy had been determined by forfeiture, and added, p. 338: "Although the tenancy was in that case by deed, and the decision turned partly upon its terms, the law annexes, as we have seen, a similar condition to farming and other leases even when there is no deed."

Willes, J., said, p. 339: "The only question is, whether such a stipulation could operate as an enlargement of the term, and I know no reason why it should not. No case has been cited to the contrary, and from early times it has been held that it could. I do not mean that it would operate as an extension for all purposes, but only so far as to give to the tenant a control over the premises, and the right to remove his goods and do all things necessary for that purpose—that is, a right annexed by law in the case of a tenant at will, and in that of an executor of a tenant for life."

In *London and Westminster Loan and Discount Co., Limited, v. Drake*, 6 C. B. N. S. 798, a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant:—Held, that the mortgagees had a right to enter and sever the fixtures, it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender.

In the discussion it was contended that the tenant's fixtures were goods and chattels which he had only a right to remove during the term or his possession of the premises. The fixtures had not been severed until after the surrender of the lease to the landlord and a new lease granted by him, and the new tenant was in possession. It was urged that a tenant for years had not authority to confer on a third party an estate in fixtures independent of the soil.

In argument the counsel said, p. 807: "The grant is of the property in the fixtures, coupled with a right of removal."

Cockburn, C. J., asked: "Has the tenant a *property* in these fixtures whilst they are attached to the soil?"

Williams, J., said, p. 808: "It is difficult to say that the decision in *Hallen v. Runder*, 1 C. M. & R. 266, is law, if the tenant has a property in fixtures," referring to the expression in reference to unsevered fixtures at the end of the term, that they become "a gift in law" to the landlord, as being inconsistent with the absence of property in the tenant. Cockburn, C. J., said: "It may mean a gift of the *right of removal*."

The counsel did not contend that the assignee had an absolute indefeasible title in the fixtures, but that the surrender as against him operated no further than if the tenant had assigned his interest in the term to a third person.

In giving judgment, p. 810, Williams, J., referred to the rule of law laid down in *Co. Litt.* 338 b, as to surrender, that "having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching *any right or interest* they had before the surrender) the estate surrendered hath in consideration of law a continuance." The Court were of opinion that the mortgagee's right to sever the fixtures from the freehold was a right or interest within the meaning of that rule of law.

The learned Judge added, p. 811: "Certainly it is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. But we think it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender."

Pugh v. Arton, L. R. 8 Eq. 626, is the last case I have seen in which the question as to the time at which the right to remove trade fixtures was brought up and discussed.

The facts of that case were, that in 1865 plaintiff let certain premises to one Vaughan for seven years, at a rent of £150, with a clause of re-entry if the lessee should become a bankrupt, make an assignment, &c. At the date of the lease, there were on the premises divers tenant's fixtures,

some of which had been removed and others substituted for them, and Vaughan had affixed to the freehold of the premises certain other fixtures, which were removable by the tenant. On 10th May, 1867, Vaughan executed a deed of arrangement with his creditors, in consequence of which the plaintiff was entitled to determine the tenancy and to re-enter, but at the earnest entreaty of Vaughan the plaintiff consented to allow him to occupy the premises as a yearly tenant, but upon all the terms and conditions of the lease, and he accordingly continued in the occupation of the premises, and had paid rent up to 25th December, 1868. On 11th March, 1869, plaintiff discovered that Vaughan had on the 2nd of that month executed a deed conveying all his estate and effects to the defendant, Arton, absolutely, to be administered for the benefit of his creditors as if he had been adjudged a bankrupt. The deed was registered on 11th March. The plaintiff served a notice on defendant on 12th March, 1869, stating that the fixtures belonged to him, and as the term and interest of Vaughan in the premises had been forfeited by breach of the conditions of the lease, the plaintiff claimed possession of the premises and fixtures. On the 14th March the plaintiff put a man in possession of the premises, where the fixtures still remained, whom the defendant afterwards forcibly ejected. The plaintiff then filed his bill to restrain the sale or removal from the demised premises of any of the shop fixtures which were in, upon, or affixed to the messuage and premises at the time when Vaughan entered upon and became tenant thereof, or all or any of such fixtures attached to the freehold of the premises since Vaughan became the lessee or tenant thereof.

The learned V. C. Malins discusses the question, and in one part of his judgment says, p. 629: "A great many cases have been cited, most of which are collected in *Woodfall's L. & T.*, 535, where it is laid down that when a lease expires by lapse or forfeiture by the act of the tenant (the right being the same in either case) if the tenant does not remove the fixtures during the continuance of the lease, or

during the period whilst he remains in lawful possession, it is too late for him to do so after the landlord has entered for forfeiture."

Further on he says, p. 630, that those cases which were cited "do not vary the old law on the important principle involved in this case, nor do I think that it has been varied. Although I was told that the rule had been greatly relaxed, I do not find it so, but only that where there is an express contract between the parties the Court will put a reasonable construction upon it, and allow a tenant a reasonable time; in the absence of such contract there is no such right. I intend to act, therefore, on the law as I find it, and as I think it is, namely, that unless the tenant protects himself by a contract giving him a right to take away the fixtures after the expiration of the term either by lapse of time or by his own act, he cannot do so."

Under the facts of that case, as the landlord had entered before the fixtures were severed, according to the prior decided cases the right to remove the fixtures was gone. But suppose the landlord had not actually entered, but the lease had terminated, and the tenant or his assignee was in possession, then, according to the language of the latter part of the learned Vice-Chancellor's judgment, the lessee or assignee would not have the right to remove the fixtures.

As already intimated, I think the weight of authority is that the tenant may remove trade fixtures which he might have removed during the term if he remains in lawful possession after the end of the term, "holding the possession of the premises under a right still to consider himself a tenant."

If a lease is made by the owner, the fixtures would be included and pass whether expressed in the lease or not, and if a tenant takes a new lease from his landlord during the currency of the old one, that by operation of law will be considered a surrender of the old lease if its terms are inconsistent with the old one. Such a surrender will prevail

whether such be the intention of the parties or not : *Lyon v. Reed*, 13 M. & W. 285.

The same doctrine as to intent of parties applies in cases of merger by operation of law.

If a tenant, then, with a right to remove fixtures, surrenders his term either directly or by operation of law, and takes a new lease, the result seems to be that the fixtures are included as part of the property leased by the landlord, and in this view the tenant would lose his right to remove, though in possession under the new lease, and no actual entry by the landlord under the surrender.

In *Elwes v. Mawe*, 2 Sm. L. C., 6th ed., 153, at page 183, it is thus laid down: "It must be further remarked that, unless *Penton v. Robart* be considered as overruling *Fitzherbert v. Shaw*, 1 H. Bl. 258, it must be taken with the important qualification established by that case, viz., that where the tenant's continuance in possession is under a new lease or agreement, his right to carry away the fixtures is determined, and he is in the same situation as if the landlord, being seized of the land together with the fixtures, had demised both to him. See *Fitzherbert v. Shaw*, recognized in *Heap v. Barton*, 12 C. B. 274."

In *Woodfall's L. & T.*, 10th ed., 531, it is laid down thus : "Where a tenant renews or extends his term, he must be careful to preserve his right to fixtures, for without some express stipulation on the subject, he may lose his right at the expiration of his first term."

There is a reference to the same subject at page 540. *Fitzherbert v. Shaw*, 1 H. Bl. 258 ; *Thresher v. Company of Proprietors of the East London Water Works*, 2 B. & C. 614, are cited as authorities for the proposition.

In *Amos & Ferard on Fixtures*, 2nd ed., at pp. 345, 351, reference is made to the same point with the same view.

Taylor on L. & T., sec. 552 ; *Hill on Fixtures*, sec. 48, adopt the view put forth in *Woodfall's L. & T.*, and *Amos and Ferard on Fixtures*. A case is also cited, *Winslow v. Merchants Insurance Co.*, 4 Met. 306.

The plea out of which the replications, rejoinders, and

demurrers arise, alleges that the *locus in quo* was occupied by defendants as scale makers as tenants of the plaintiff, the premises having long before the time when, &c., been let to defendants and other tenants for carrying on trade; and that the defendants and other tenants, in the course of their trades and business, and for the purpose of carrying on the same in the said premises, during their said tenancies, before the said time, set up and erected thereon the said bake-oven, together with the other more valuable portions, and the said others during their said tenancies sold and conveyed all their portion of the fixtures to defendants, who took possession of the same and used them as their property in the course of their business upon the demised premises, and being so possessed of the said fixtures and the demised premises and carrying on their trade therein, they during their tenancy pulled down and carried away the said parcel in the introductory part of the plea mentioned.

The first replication, as to so much of the plea as relates to the fixtures affixed to the premises by other tenants during their tenancy and purchased by the defendants, says they were not severed from the premises during the *terms* of the tenancies of the tenants so affixing the *same*, nor for a *long time afterwards*, whereby they became part of the freehold, which was conveyed to and became the property of the plaintiff before the committing of the grievances in the declaration alleged.

The rejoinder to this replication on equitable grounds is, that the said fixtures were severed and removed within a reasonable time after the expiration of the terms of the tenants, from whom defendants purchased the same, and at the time of the purchase of same by defendants from the tenants, they obtained an assignment of their leases in that behalf, and went into possession by virtue of the assignment of the premises with the assent of the persons who conveyed the premises to the plaintiff, and paid rent to them; and defendants continued from that time until the time of the severance in possession and occupation of the

premises, as plaintiff well knew, without waiving, surrendering, or in any manner releasing or destroying their right to such fixtures.

The first replication seems to set up that because the fixtures put up by the prior tenants were not removed during the time of their tenancy, *nor for a long time afterwards*, they thereby became the property of the landlord. What the "for a long time afterwards" may mean we cannot tell. If the defendants were the owners of the fixtures and removed them whilst they were in possession of the premises under the right to consider themselves as tenants, we do not see why the omitting to sever them for a long time can make a difference. Some of the cases have held that where the tenant by special agreement has a right to remove his fixtures at the end of the term, he has a reasonable time after that to remove. But that is not the view here presented.

In another case, where the landlord under a contract terminated a lease at will, it was said the tenant had a reasonable time to remove his fixtures.

Here the right is claimed by virtue of being still a tenant. If the plaintiff wished to shew that the former tenancy had ended, and a new hiring had taken place, and the alleged fixtures had become his property and were leased to defendants, that would have been another question. As we understand the replication the plaintiff merely alleges that because the alleged removal was a long time after the end of the term, therefore the fixtures belonged to the landlord. We do not think that that necessarily follows.

In this view we think the first replication bad.

The second replication is, that the fixtures were so affixed to the buildings on the demised premises that they could not be removed by the defendants without injury to the freehold of the said demised premises.

The rejoinder to the second replication is, that they were such trade fixtures as in the first plea alleged, and could be and were removed without causing more injury to the free-

hold of the demised premises than was then permissible by the laws of Ontario concerning fixtures.

The demurrer is on the grounds—1. That it amounts to a joinder of issue to the plaintiff's replication. 2. It attempts to put in issue by a jury a matter of law. 3. It is no answer to the replication. 4. It does not confess or avoid or traverse or deny the allegations in the replication.

The defendants object to the replication because it raises an issue that some small injury was done, which is a point wholly immaterial to the defence shewn in the plea.

Under the present system of pleading we think the second replication and rejoinder is to it both good, and they may be taken distributively.

It may be a question of mixed law and fact whether the alleged fixtures were so attached to the freehold that they could not by law be removed by the tenant.

In the note to *Elwes v. Maww*, 2 Sm. L. C., 6th ed., 153, as to the right to remove fixtures, this language is used, at p. 175: "To whatever extent the right to remove trade fixtures may be carried, common sense and justice seem to require that it should be bounded by the rule laid down by Lord Hardwicke in *Lawton v. Lawton*, 3 Atk. 13, viz.: that the principal thing 'shall not be destroyed by the accessory.' It may perhaps be deduced from this, that, if a trading fixture could not be removed without the destruction or great and serious injury of some important building, it would be irremovable. But when the building is but an accessory to the fixture, such as an engine house, and built to cover it, then we have the authority of the text for saying that one as well as the other is removable."

In discussing the subject in *Amos & Ferard*, page 89, amongst the circumstances essentially to be regarded as to whether a fixture is removable, the third is, whether its removal is likely to occasion any considerable damage to the freehold.

If the article is to be considered as a fixture, it must be

attached to the freehold so as to become a part of it, and how it can be severed without doing some injury seems difficult. In the removal a hole may be left in the wall where a screw was used for annexing the fixture; that is *some* injury to the freehold, but it is so trifling that it has never been considered as a reason for holding that the tenant could not remove it. Yet there may be fixtures so attached that it would be a serious injury to the freehold to remove them, and so the tenant would not have the right. It seems impossible, therefore, to hold the replication bad for alleging that these fixtures were so attached to the demised premises.

In *Avery v. Cheslyn*, 3 A. & E. 75, the declaration, amongst other things, charged the defendant, being the plaintiff's tenant, with wrongfully pulling down and removing cornices of divers, to wit, ten rooms. The defendant, as to pulling down the cornices in one room, said that it was a wooden cornice placed by defendant at his own expense during his tenancy, with screws only, and for purpose of ornament, and so remained fixed up and merely ornamental, and that before the end of his tenancy, and whilst he was in occupation, he carefully unscrewed and removed the cornices, (the same having been from the time it was so fixed up to the time when it was pulled down and removed, and being at the last mentioned time, removable by law, and of right, by the defendant as such tenant): that the defendant did no unnecessary damage, &c., and before the end of his tenancy he, at his own expense, repaired all damage which had arisen from the fixing up and pulling down of the said cornice.

On the trial, before Coleridge, J., evidence was given as to the manner in which the cornice was fixed to and removed from the house. The learned Judge desired the jury to say whether the cornice was merely a matter of ornament fixed during the tenancy without doing *substantial* injury to the freehold, and so removed in fact during the tenancy, and in that case to find for the defendant. The jury found for the plaintiff, damages £60.

It was contended that the plea only raised an issue in law.

But Littledale, J., said, p. 78: "It was right to direct the jury to enquire whether the cornice was ornamental, whether it was capable of being removed, and whether it was removed during the tenancy."

Lord Denman, C.J., said: "The fact of the removal without damage was put as a test of the way in which the cornice was fixed."

And Patteson, J., said: "If it be a mere issue of law, that ought rather to be objected to in arrest of judgment. But it involves fact as well as law, and it seems to amount to an informal issue of fact. It seems to me also, as to the direction, that the fact of the removal without injury was suggested to the jury only as a test of the way in which the cornice was fixed; and it formed a very good test."

We think the defendants' rejoinder to the second replication may be considered as an informal joinder of issue on the replication, and is good on general demurrer; and that the second replication is also good.

The third replication sets up by way of estoppel, the fact of the fixtures belonging to the plaintiff, arising out of the surrender in law of the old lease and the acceptance of the new one after the annexation of the fixtures, and that defendants are thereby estopped from setting up any right in themselves to the fixtures, &c., in the plea described.

The defendants' rejoinder to the third replication sets up notice and knowledge by the plaintiff that defendants were in the actual and visible possession and occupation of the premises, and claiming and using the trade fixtures, and that the plaintiff was told and informed by Counsel when he sold and conveyed to the plaintiff that he was not and did not claim to be the owner of the fixtures, and only received the pay for the premises without the trade fixtures, and that the plaintiff well knowing the premises carelessly and negligently omitted to seek information.

We think the third replication, by way of estoppel, good. The case referred to on the argument, *Donkin v. Crombie*,

11 C. P. 601, seems to be an authority to sustain the plaintiff's view.

It is true the simple denial that the fixtures were the defendants', or the issue on the fact of their being the plaintiff's, might decide the question on shewing the fact of the taking of the new lease without excepting the fixtures or making any provision for them might suffice. But the pleader might desire to prevent the question of intention being discussed, and prefer pleading the estoppel, so as not to leave the matter in any way at large. We fail to see how his having no knowledge or notice of the defendants having owned the fixtures can make any difference, or whether it was their intent that the surrender in law should have the effect which it has. The question of intent, knowledge, or means of knowledge, either as a legal or equitable defence, seems to us not to be a matter which can properly come up under the facts set out in the pleadings as the law now stands.

That part of the plaintiff's replication which sets out his information and belief that certain things were appurtenant to and formed part of the freehold when he became the purchaser, it seems to us may be rejected. If they did belong to the freehold they passed to him whether he was so informed or not; if they did not belong to the freehold, they would not pass whether he was told so or not.

We think, therefore, the plea good on general demurrer, and that the replication is bad.

It is embarrassing to dispose of questions relating to fixtures without knowing the facts. In many of the cases where the Courts have been called upon to decide the questions the facts have been brought before them either on a trial or by their being found by an arbitrator, &c., and then a decision could be arrived at with full knowledge as to what was being decided. Whether a chattel is annexed to the freehold is often a question of fact, and whether as a fixture or as a part of the freehold absolutely must be decided on a knowledge of all the facts.

In *Foley v. Addenbrooke*, 13 M. & W. 174, 197, where the

question was as to the right to remove certain articles referred to, the Court said that the lessees had a right to remove them, doing as little damage as possible, and leaving the premises in a state fit to be used for similar purposes by another tenant. Many articles which under the facts of that case were removable are referred to, and the reasons why removable pointed out; such as are not removable are also mentioned.

In *Hellawell v. Eastwood*, 6 Ex. 295, the question of fixtures is much discussed.

The result is, that the plea is good. The first replication is bad. The second and third replications are good.

As to the rejoinder to the first replication, that is of no consequence, as the replication is bad.

The rejoinder to the second replication is good. The rejoinder to the third replication is bad.

Judgment accordingly.

MEMORANDA.

In Michaelmas Term the following gentlemen were called to the Bar :—

NORMAN FITZHERBERT PATERSON, JOHN MCCOSH,
MICHAEL EDWARD O'BRIEN, JAMES HENRY COYNE, WIL-
LIAM HENRY MCFADDEN, GEORGE HUGHES WATSON.

On the 22nd of December, 1874, the following rule was read and promulgated in open Court :—

“ IN THE COURT OF QUEEN’S BENCH, AND THE COURT OF
COMMON PLEAS.

Regulae Generales.

AS OF MICHAELMAS TERM, 38TH VICTORIA.

Tuesday, 22nd day of December, A.D., 1874.

It is ordered,—Subject to the direction of the Court in all cases,—that hereafter, the first six cases standing undisposed of on the New Trial List, or such other cases as the Court shall see fit to direct, shall stand on such New Trial List each New Trial Day, to be peremptorily disposed of on each day, if the time of the Court will permit ; and that no such case shall be put off or postponed without a special application being made to the Court, or a Judge, on affidavit, and on such terms as to payment of costs of the day and otherwise, as to the Court or Judge shall seem fit ; and that if any such case is not disposed of on the day for which it stands, by being argued or postponed, if it is reached in its turn, and the time of the Court admits of its being so argued or postponed, it shall be struck out of the New Trial List, and the rule granted therein shall be discharged, unless otherwise ordered.

It is further ordered—That the Clerk of each Court shall prepare a List of such cases, to be so peremptorily disposed of, for each New Trial Day ; and shall put up such list on the usual paper board of each Court respectively, on the day before that on which the said cases are to come on.

(Signed) WM. B. RICHARDS, C.J.
 “ JOHN H. HAGARTY, C.J., C.P.
 “ JOS. C. MORRISON, J.
 “ ADAM WILSON, J.
 “ JOHN W. GWYNNE, J.
 “ THOMAS GALT, J.

SITTINGS IN VACATION

AFTER MICHAELMAS TERM.

REGINA V. PATRICK BREEN.

37 Vic., ch. 32, sec. 25 O.—*Conviction under—Negating exceptions.*

A conviction under sec. 25 of the 37 Vic., ch. 32, O, for unlawfully having spirituous, &c., liquors for the purpose of selling without being first duly licensed thereto, need not negative the exceptions contained in secs. 26 and 27.

The penalty enacted by sec. 52 applies to cases where the Act complained of was done either by the applicant or by some other person.

IN Easter Term, 1874, *J. A. Miller* obtained a rule *nisi* (in full Court), to quash a conviction made by the Police Magistrate of St. Catharines, for unlawfully having spirituous, fermented, and manufactured liquors, for the purpose of selling the same without being first duly licensed thereto.

The grounds taken in the rule were: 1. That there was not any evidence, or sufficient evidence, to sustain the same.

2. That the conviction does not set forth or state any offence or crime whatever, and is bad in law, inasmuch as it does not shew or state that the above-named Patrick Breen was not at the time of the alleged offence a brewer, distiller, or other person duly authorized by the Government of Canada for the manufacture of fermented, spirituous, or other liquors

3. That the conviction does not shew or state that the said Patrick Breen was not at the time of committing the alleged offence a chemist or druggist duly registered as such, under and by virtue of the Pharmacy Act of 1871.

4. That the conviction does not shew that the said Patrick Breen had the spirituous, fermented and manufactured liquors mentioned in the said conviction, in the said

house for any purpose other than for sale under legal process, or for distress, or that he was not an Assignee in Insolvency, and as such had them for sale.

5th. That no penalty is imposed by 37 Vic., ch. 32, O., or any other statute, for the punishment of offences against sec. 25 of the said Act, or for the punishment of persons guilty of the offence charged against the said Patrick Breen, and specified in the said conviction; and the Police Magistrate aforesaid had no power to order the said Patrick Breen to pay a penalty or to pay costs, nor had he power to order the same to be levied by distress, and, in default, to order the committal or imprisonment of the said Patrick Breen as in the said conviction is set forth.

On the 15th of December, 1874, *Osler* shewed cause before Galt, J., sitting alone under the Administration of Justice Act.

Miller supported the rule.

The arguments and authorities appear in the judgment.

January 8, 1875. GALT, J.—It appears to me that there was ample evidence to sustain the conviction, and indeed that objection was hardly pressed at the argument.

The 2nd, 3rd, and 4th objections are as to the form of the conviction.

The 25th sec. is : “No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors for the purpose of selling, bartering, or trading therein, unless duly licensed thereto under the provisions of this Act.”

It is to be observed that there is no exception or proviso in this section; but the 26th sec. enacts that the “two preceding sections shall not prevent any brewer, distiller, or other person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having or selling any liquor manufactured by him,” &c.

The 27th sec. also enacts that "The said sections numbered 24 and 25 shall not prevent any chemist or druggist, duly registered as such under and by virtue of the 'Pharmacy Act of 1871,' from keeping, having, or selling liquors for strictly medicinal purposes, &c., &c.

The contention on the part of the defendant is that these exceptions should have been negatived in the conviction, and he relied on the judgment in *Regina v. White*, 21 C. P. 354, to establish this. In that case, however, the exception was contained in the same section as that constituting the offence, whereas, in the one now before me, the exceptions are in different subsequent sections.

Mr. Miller argued that as there are express words of reference in the 26th and 27th sections to the 25th section, it should be read as if they were incorporated with it; and he relied on the law as laid down in *Paley on Conviction*, 3 ed. p. 231, where it is said: "The rule, therefore, and distinction resulting from these and confirmed by the cases mentioned in the sequel, seem to be clear, viz., that all circumstances of exemption and modification, whether applying to the *offence* or to the *person* that are either originally introduced into or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; but that such matters of excuse, as are given by other distinct clauses or provisos, need not be specifically set out or negatived."

A reference to the cases from which this rule has been deduced, satisfies me that the "incorporation by reference" meant by the learned author, is a reference *in* the enacting clause and not *to* it.

At page 229, after quoting an opinion of Mr. Sergeant Hawkins as to the necessity of negativing all the provisos annexed to the offence, whether by the same or any other clause or statute, as well as those in the enacting clause, he says: "The rule, however, seems, as established in practice, to be restricted to those of the latter description only."

In *Regina v. Jukes*, 8 T. R. 542, Lord Kenyon said that the *conviction* could not be supported "because the

information did not negative the exception in the clause enacting the offence * * that the only cases where this was not necessary to be done were, where the exception was introduced in a subsequent clause, and there it must come by way of defence on the part of the defendant."

The fifth objection remains to be considered. There is no penalty attached in the 25th clause to an infringement of its provisions, but by the 52nd sec. it is enacted: "The occupant of any house, shop, room, or other place, in which any such barter or traffic of spirituous, fermented, or manufactured liquors, or any matter, act, or thing in contravention of any of the provisions of this Act has taken place, shall be personally liable to the penalty and punishments prescribed in the 34th and 35th sections of this Act, as the case may be, notwithstanding such sale, barter or traffic be made by some other person who cannot be proved to have so acted under or by the direction of such occupant."

Mr. Miller argued that the penalty enacted by this section could be extended only to cases where the act complained of was done by some person other than the defendant; but I am satisfied that so far from that being the meaning of the Legislature, it was their intention that the occupant should be in all cases responsible, and that he should not be heard to say that the act was done by some other person, without his directions. The penalty awarded by the Magistrate in this case is in accordance with the provisions of the 34th section.

This rule is therefore discharged, and the conviction affirmed with costs.

Rule discharged.

IN THE MATTER OF PARSONS AND TOMS—IN RE VOTERS'
LIST OF GODERICH.*Voters' Lists—37 Vic., ch. 4, O.*

Under 37 Vic., ch. 4, sec. 5, O., the County Judge has the right to examine and decide whether the person objecting to any votes in the list of voters is a voter or person entitled to be a voter, although such complainant may appear on the roll as duly qualified.

The Judge having found as facts, on the evidence before him, that one of the two complainants did not give the notice of his complaint required by sec. 6, and that the other was not entitled to be a voter: *Held*, that his decision could not be reviewed.

ON the 22nd day of December, 1874, *Hodgins*, Q. C., obtained from Gwynne, J., sitting alone under the Administration of Justice Act, a rule *nisi* for a writ of mandamus, commanding Isaac F. Toms, Esquire, junior Judge of the County Court of Huron, to proceed with the revision of the printed voters' list of the township of Goderich, and to proceed to hear the complaints or appeals of George H. Parsons and Joseph McClusky, or one or both of them, pursuant to the notices of complaint or appeal given by them, or both or one of them, in respect of said voters' lists, on grounds disclosed in affidavits and papers filed.

The facts appeared to be as follow:—On the 5th of September, 1874, a notice of objection to the votes of 130 voters was left with the township clerk, purporting to be the notice of and signed by Joseph McClusky and George H. Parsons.

There was no objection to the notice on the question of time, but it appeared that it was first drawn up as the notice of McClusky alone, and signed by him. Being afterwards dissatisfied with having signed it, McClusky struck out his signature in the notice and duplicate, and left the papers at the house of the attorney who prepared them.

On the 16th of September, 1874, McClusky sent a notice to the township clerk to the effect that, having come to understand the meaning of the notice of the 5th of September more fully, he desired that the appeal should proceed in the usual way.

The notice, as proved before the learned Judge, was altered so as to be the notice of McClusky and Parsons, and was signed by George H. Parsons, while the signature of McClusky was struck out.

It was objected before the learned Judge that under these circumstances the notice of the 5th of September could not be considered the notice of McClusky.

It was also objected that Parsons had not the proper *status* to entitle him to give the notice of appeal.

As to this point, the evidence shewed that Parsons was assessed, as his name appeared on the voters' list, as George Parsons (not George H. Parsons), for lot 22, 1st con., Goderich: that he had been assessed for the lot for several years: that he acquired a joint interest in it with a brother and sister, under his father's will: that after his father's death he had made an assignment in insolvency, and previous to his insolvency had parted with all interest in the lot. Parsons also stated that he had made a verbal lease of the lot to one Cautelon, and had received the rents and profits of it since 1857, and that Cautelon was his tenant.

It was objected on the argument before the junior Judge below that he could not entertain the question of the *status* of Parsons, as Parsons's name duly appeared on the voters' list.

The learned Judge found as questions of fact upon the evidence before him: 1. That McClusky did not give to the clerk a written notice of complaint, as required by sec. 6 of the Voters' Lists Act, 1874, 37 Vic., ch. 4, O. 2. That George H. Parsons was not actually and *bonâ fide* the owner, tenant, or occupant of the real property for which he was assessed.

January 26, 1875, before HAGARTY, C. J. C. P., sitting alone under the Administration of Justice Act, *Osler* shewed cause. No material can be used here that was not before the Judge, and on that submitted to him his judgment was right. It was nowhere shewn that Parsons was the owner in fact of land for which he was assessed, and Parsons plainly could not have taken the

oath for voters, and his vote would be rejected on a scrutiny. The lists have been already certified and an election held on them, and if the Court has the power to order the writ they will not do it under the circumstances. Our affidavits shew that Parsons is not an owner or occupant. He referred to the reasoning of the Judge below.

Hodgins, Q. C., contra. The object of the Act of 1874 is to purge the lists of bad votes, and therefore technical objections should not be encouraged. McClusky's vote was undoubtedly good, and the Judge should not have enquired into the withdrawal of his notice. There was in fact no sufficient withdrawal of the notice: *Proudfoot v. Burns*, L. R. 2 C. P. 88. Parsons' vote was not appealed against, and the Judge had not power to enquire as to his standing as a voter: *Brockville Case*, 7 L. J. N. S. 221.

January 29, 1875. HAGARTY, C. J. C. P.—I agree with the learned Judge below that he had the right to examine and decide whether the person complaining of any votes in the lists was "a voter or person entitled to be a voter," and that he was not necessarily concluded by the fact that such complainant appeared as duly qualified on the roll.

I do not see how any other construction can be placed on the 5th sec. of the Act 37 Vic. ch. 4.

It would be a singular thing if a person having no real qualification could, by getting improperly on the list or roll, have the right to institute an enquiry into the qualification of all the rest of the parties named therein.

Had the Legislature meant that the fact of being on the roll or list entitled a person to be a complainant, it would have been easy so to have enacted. When they speak of "a voter or person entitled to be a voter," they mean something beyond the mere being on the list.

As to any question of its being a public proceeding in which the constituency is interested, it may be remarked that the same may be said with greater point as to an election petition. There, if the petitioner, whose only *status*

is as a voter, can be successfully attacked as not being qualified to vote, the petition wholly fails.

It must be fully borne in mind that, in the words of sec. 5, "The decision of the Judge, under this Act, in regard to the right of any person to vote, shall be final as regards such person."

There is no appeal from his decision provided by the statutes. I have no power to enquire whether he may have rightly or wrongly decided.

All the Superior Courts can do is to see that the Judge obeys the law. They can prohibit his proceeding if such proceeding be against the law, and can direct him to proceed to perform any statutable duty imposed on him.

Here he has decided on certain matters of fact clearly within his jurisdiction. He has not refused to exercise his jurisdiction, but has done so to the best of his judgment. He has duly certified the list, and it has been acted on, and an election to the Legislature has been had upon it.

We are asked, as it were, to undo all this, to order the Judge at this late date to hold the complaint of *McClusky* and *Parsons*, or either of them, a valid complaint, and to enter upon their objections to 130 voters.

He decided as to *McClusky* that, as a question of fact, he did not give the clerk the notice required by law: that on the evidence he was not a complainant, and in fact had no intention to be one. I do not see my right to review the correctness of this finding.

As to *Parsons*, he has decided on the evidence before him that he had no right to vote. I cannot review his finding.

If it were a purely legal question that, facts being admitted, the Judge held there was no sufficient complaint before him—*e.g.*, if he held that to constitute a good complaint, it must be made and signed by two voters, when the statute only requires one—I can well understand our directing him to proceed on the complaint before him. There, with proper materials before him, he erroneously refuses to proceed.

Or, if he were erroneously proceeding in a complaint

made by one who, on its face, was shewn not to be a voter of the municipality, we would (as was recently done), prohibit him from proceeding.

In whatever shape it can be presented it amounts in substance to an appeal on the merits against the Judge's decision.

I am very far from expressing any opinion that the learned Judge did not arrive at a correct conclusion on the facts before him, both as to McClusky and Parsons; and even if I thought it right to consider the affidavit since made by the latter, I can see little in it to raise any question as to the correctness of the decision, as it carefully avoids touching the real points in the case.

After hearing the parties and pronouncing his opinion, the learned Judge handed the certified lists to the Returning Officer under the late Act.

I refuse this application. I do not think it necessary to consider some difficulties that suggest themselves as to interfering at this stage of the proceedings, after all the steps that have been taken.

My judgment does not touch any points beyond those specially mentioned.

I think the learned Judge below should have any costs to which he has been put by these proceedings.

Rule discharged with costs.

IN THE MATTER OF THE LONDON, HURON, AND BRUCE RAILWAY COMPANY, AND THE COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF EAST WAWANOSH, THOMAS H. TAYLOR, AND JAMES MCGOWAN, RESPECTIVELY REEVE AND TREASURER OF THE SAID TOWNSHIP.

By-laws granting aid to railways—Mandamus to issue debentures.

UPON an application for a mandamus to a Township Corporation to make and deliver to trustees certain debentures for 25,000 authorized by two by-laws of the Corporation granting aid to a Railway Company, it was argued that the Company had lost all claim to \$18,000, if not to the whole, of the bonus, by non-commencement of their road. On the other hand, the Company contended that by certain agreements with the Corporation, and by several statutes extending the time for commencement, their right to the debentures was preserved—*Held*, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was discharged with costs.

ON the 23rd November, 1874, *Harrison, Q.C.*, obtained from Morrison, J., sitting alone under the Administration of Justice Act, a rule *nisi* for a writ of *mandamus* commanding the Council of the Corporation of East Wawanosh, and Thomas H. Taylor, as the Reeve, and James McGowan as the Treasurer thereof, forthwith to make, sign, seal, execute, and deliver, or cause to be forthwith made, signed, sealed, executed, and delivered to certain trustees in that behalf, appointed under and pursuant to section 14 of the Act Incorporating the London, Huron, and Bruce Railway Company, the debentures authorized and required by two by-laws of the Council of the Corporation of the township of East Wawanosh, granting aid to the said Company, numbered 35 and 43 respectively; the former having been passed on the 10th day of October, 1871, authorizing aid to the amount of \$18,000, and the latter passed on the 20th day of December, 1872, authorizing aid to the amount of \$7,000.

The facts sufficiently appear from the judgment.

On December 22nd, 1874, the motion was argued before Gwynne, J., sitting alone under the Administration of Justice Act.

J. K. Kerr shewed cause. The construction of the road should have been commenced in a year in the terms of the agreement to that effect: *Luther v. Wood*, 19 Grant 348. The time has been extended by statute, but that does not affect the agreement. The deviation from the line fixed by the agreement also is a reason why the writ should not go. 37 Vic., ch. 49, sec. 7, which authorizes deviations, excepts the case where any agreement has been made. The application is by the wrong persons. There is nothing to shew that the trustees are ready or willing to accept the debentures. There is no sufficient demand proved, and nothing to shew that the township authorities were aware of the appointment of the trustees. The Act requires that the trustees should be appointed in a particular way, and there is no evidence they were so appointed. The Council should not have been made parties to the application, but only the Reeve and Treasurer. The enterprise is, as appears from our affidavits, a complete failure. The submission of the second by-law was no waiver of the terms of the first.

Harrison, Q. C., contra. The affidavits shew that all the other townships have handed over their bonuses, or will do so, except this township. The by-law is unconditional, and we are not restrained by the agreement. The bonus must be paid over without any terms: 34 Vic., ch. 42, sec. 14. The township, however, is amply guaranteed, as the trustees cannot pay over the moneys to the railway till the work is done. There is no limitation in the by-laws as to the time the work is to be commenced in or finished. Here time is not of the essence of the contract, as in *Luther v. Wood*, 19 Grant 348, so that case will not apply. If any conditions did attach under the first by-law, they have been waived by the second, by which, in consideration of a change of gauge, a larger bonus was given to the Company, and a new contract entered into between them. The presumption is, that the trustees were duly appointed.

January 29, 1875. GWYNNE, J.—By an instrument bearing date the 21st day of September, 1871, pur-

porting to be made between "The London, Huron, and Bruce Railway Company of the first part, and the Corporation of the township of East Wawanosh of the second part," but which was executed only by the Railway Company, and which recites that the Railway Company had applied to the township for aid in the shape of a bonus of \$18,000, and that the Corporation of the township had agreed to pass a by-law granting such bonus upon the security of the covenants of the Railway Company as follows, viz., that the said bonus of \$18,000 to be granted by the township, or the proceeds of the debentures to be issued therefor, should be expended *pro ratâ* per mile for work done upon works of construction of the said Railway, to be commenced within one year and completed according to charter, that is to say, within five years from the 15th of February, 1871, within the limits of the township of East Wawanosh; and further, that the said Railway Company will erect, maintain, and keep a station on the line of the said railway, within one half mile of each of the following places, namely: Blythe, Belgrave, and Wingham; and further, that they will not call for, demand, or seek to use the interest which may accrue due on said debentures until the work is commenced either in the township of East Wawanosh or in the adjoining township of Morris, within one mile of the Wawanosh boundary, or as near as engineering difficulties will permit, and will direct the trustees who shall have the said debentures to cancel and deliver to the township Corporation all coupons for interest which may accrue due before the commencement of the work.

Upon this instrument being executed by the Railway Company, the Council of the Township Corporation passed the by-law No. 35, which was submitted to and approved by the vote of the ratepayers, and finally passed on the 10th of October, 1871, when one David Scott was Reeve.

This by-law, without any reference contained in it to the instrument of the 21st September, 1871, enacted: That it should be lawful for the municipality to assist the

Railway Company by giving thereto by way of bonus the sum of \$18,000. 2nd. That it should be lawful for this purpose for the reeve of the municipality to cause any number of debentures to be made for such sum of money as might be required for the said purpose, not less than \$100 each, and not exceeding in the whole \$18,000, bearing interest at the rate of six per centum per annum, and for the purpose of redeeming such debentures it authorized the levy of a special rate.

On the 2nd of March, 1872, the Company obtained the passing of an Act to extend the time for commencing and completing their road, whereby it was enacted that the 37th sec. of the Act, 34 Vic. ch. 42, be and the same is hereby repealed, and the following substituted in lieu thereof:—

“The said Railway shall be commenced within two years, and completed within six years after the passing of this Act, or else the charter shall be forfeited, and the said Act shall be construed as though the substitution were in the said Act originally.”

The Corporation of the township now contend that the Railway Company has lost all claim to this bonus of \$18,000, because, as is alleged, the railway has never yet been commenced, at the time of the making of this application.

To this the Railway Company answers:—That by an indenture bearing date the 20th day of December, 1872, and made between the Corporation of the township of the first part, and the Railway Company of the second part, and executed under the respective corporate seals of the township municipality and of the Railway Company, and under the hands of the President and Secretary of the Railway Company, and of the reeve of the township—after reciting that the Railway Company had applied to the township municipality for assistance in the construction of the Company's Railway to the extent of \$7,000, *in addition to the amount heretofore granted by said township for the same purpose*, and that the said township had agreed to

grant the same upon the provisions and conditions hereinafter expressed—it was provided and agreed that debentures, to be issued under the by-law to be passed, should be delivered to the trustees appointed under the Act, but that the proceeds of such debentures should only be used in works of construction of the said railway, either in the township of East Wawanosh or in the township of Morris, and within one mile of the eastern boundary line of the said township of East Wawanosh.

2. That the Railway Company will erect and maintain a station on the said railway, at or within one half mile of each of the following places, namely, Blyth, Belgrave, and Wingham.

3. That no portion of the proceeds of the said debentures shall be paid over to the said Company until the said railway is completed and in running order to Belgrave, and graded to Wingham, the same to be done within the time limited by the Act incorporating said Company.

4. That the coupons for interest which shall have accrued due on said debentures before the commencement of such work in the township of Morris or the township of East Wawanosh, shall be cancelled and delivered to the said township. And it is hereby declared that the township would not have passed the by-law granting said bonus, or granted the same except for the purpose of securing the building of said railway by the route aforesaid, and the erection of stations at the points aforesaid, and the expenditure of money in the works of construction aforesaid. And it is further declared that the said Company accept the said bonus upon and subject to all the above conditions.

At the time of entering into this agreement the by-law therein referred to had passed two readings in the Council, and had been submitted to, and approved by, the vote of the ratepayers, and was declared to have effect upon and from the 1st day of January. And the Railway Company's contention is, that by this agreement, it being stated that the \$7,000 was sought in addition to the \$18,000

already granted, both grants are in effect made subject only to the terms of the second agreement, and that, therefore, the \$18,000 bonus is not lost by reason of the railway not having been commenced within the period specified in the agreement of the 21st September, 1871.

The township, on the contrary, contends that the \$18,000 bonus depends wholly upon the agreement of the 21st of September, 1871, and is not revived by reason of anything in the agreement of the 20th of December, 1872, or in the by-law therein referred to; and further, that the \$7,000 itself is affected by the agreement in the first instrument as to the commencement of the road at least within the time there directed and defined by the Act of Parliament then in force; and their contention is, that if the debentures had been handed over to the trustees at the time of the passing the respective by-laws, the township would be now entitled to a redelivery of the debentures, upon the authority of *Luther v. Wood*, 19 Grant 348. The Railway Company, on the contrary, contend that the extension of time granted by the Legislature preserves their right to the debentures, notwithstanding anything contained in the instrument of the 21st of September, 1871; and moreover, that the terms therein specified, and in the agreement of the 20th December, 1872, are not conditions precedent to the issuing of the debentures, but that they operate as covenants securing the application of the proceeds of the debentures when issued.

The by-law No. 43, passed in December, 1872, says nothing from which it can be gathered that the amount of \$7,000 therein mentioned was intended to be granted in *addition* to the \$18,000 which, according to the present contention of the learned counsel for the township, as I understand it, it is insisted was then already forfeited.

There is nothing anywhere from which it can be gathered that the intention of the *ratepayers* was to approve of a bonus of \$7,000 in *addition* to the \$18,000; for the recital to that effect in the agreement of the 20th of December, 1872, was after the submission of the by-law

No. 43 to the ratepayers for their approval, and the ratepayers at large do not seem to be affected with any knowledge of it.

The by-law No. 43 recites merely that the municipality of the township of East Wawanosh has determined to aid and assist the said Company by giving thereto, by way of bonus, the sum of \$7,000 under the authority of the Recited Act, namely, 34 Vic. ch. 42; and further, that in order to carry into effect the said recited object, it will be necessary for the said municipality to raise the said sum of \$7,000 in the manner hereinafter mentioned; and it further recites as follows: "And whereas the amount of the *existing* debt of the said municipality is as follows: "Principal, nothing; interest, nothing; of which nothing is in arrear." It then enacts that it shall be lawful for the municipality to assist the Railway Company by giving thereto, by way of bonus, the sum of \$7,000, and it then provides for the issuing of debentures for this sum and for levying a special rate to redeem them.

The above recital, that there was no existing debt of the municipality, would seem to imply that the grant of the bonus of \$18,000 was considered as being no longer binding. The ratepayers, at any rate, when voting on this by-law, may have been of that opinion, whatever may have been the ideas of the councillors upon the subject.

Upon the 23rd March, 1873, the Railway Company obtained an Act of the Legislature further amending the Act of Incorporation of the Company, by the 8th sec. of which it is enacted: "That the said railway shall be commenced within three years and be completed within five years from the date of the passing of the said Act, passed in the 34th year of Her Majesty's reign, ch. 42; and the said Act shall be read and construed, and shall have effect as though the said period for the commencement and completion of the said railway respectively had been thereby allowed and limited in lieu of the periods in the said Act originally allowed and limited, notwithstanding anything

therein, or in the said Act amending the same to the contrary."

The effect of this Act, if there were no other subsequent one, would seem to be, that unless the road was commenced within three years from the 15th of February, 1871, that is by the 15th of February, 1874, the Railway Company's charter was forfeited.

By an Act, however, passed on the 24th March, 1874, the Company is authorized to deviate from its original line as located, and for which location the maps and plans had been already deposited, more than one mile from the located line, if necessary or desirable; provided, however, that nothing therein contained shall be construed to authorize a deviation of such line from any route which has been agreed upon between the said Company and any municipality which has granted a bonus to the said Company to aid in the construction of the said railway; and it is thereby further enacted that the time for the commencement of the actual work of construction shall be extended until the 15th day of January, 1875, and the said Act above referred to in the 34 Vic. ch. 42 shall be so construed as though this was the time thereby limited for the commencement of the railway.

The rights of the Railway Company to have the debentures, whatever these rights may be, whether for the whole \$25,000, or only for the \$7,000, appear to me to depend upon matters of contract; and the points urged before me, in opposition to the rights of the Railway Company, appear to me to be of such a nature that I should not determine them upon an application for a mandamus, which writ should not be issued for the purpose of adjudicating thereunder upon rights arising out of contract, where the parties have, as they have here, ample remedy, and much more suitable to be pursued by bill in equity.

Assuming the contention urged upon behalf of the township to be correct—namely, that at any time the Railway Company's claim to the whole or any part of the debentures was forfeited by non-commencement of the road

—the question whether or not the expired liability in such case of the township was revived by these clauses extending the periods from time to time for the commencement of the railway, and the extent of the liability of the township under all the circumstances, are points which should be raised and decided by suit in the ordinary way, and not by writ of mandamus.

I must refuse the application with costs.

Rule discharged, with costs.

IN THE MATTER OF THE NORTH SIMCOE RAILWAY COMPANY AND THE CITY OF TORONTO.

North Simcoe R. W. Co.—37 Vic. ch. 54, O.—By-law to grant bonus—Duty of council to submit it to ratepayers.

The North Simcoe Railway Company is incorporated by the 37 Vic. ch. 54, O., sec. 23 of which enacts that any municipal corporation “which may be interested in securing the construction of the said railway, or through any part of which, or near which, the railway or works of the said company shall pass or be situate,” may aid the company by giving money by way of bonus: provided that no such aid shall be given except after the passing of a by-law for the purpose and the adoption thereof by the ratepayers. By sec. 24 the proper petition, as prescribed in that section, shall first be presented to the council, expressing the desire to aid the railway, and stating in what way and for what amount, “and the council shall within six weeks after the receipt of such petition by the clerk of the municipality, introduce a by-law to the effect petitioned for, and submit the same for the approval of the qualified voters.”

The Company were empowered to construct a railway from Barrie or some other point on the line of the Northern Railway, passing through certain named townships, to Penetanguishene, and to extend it from some point in the township of Vespra to connect with the Northern, or with the Toronto, Grey, and Bruce Railway.

A by-law to aid the Company by a bonus of \$100,000, reciting that the City of Toronto was interested in securing a railway connection with the townships through which the line would pass, was introduced, on a proper petition, and read twice in the council; but on motion to go into committee on the by-law it was resolved, by a vote of fourteen to seven, that it would be unwise, in view of the large increase of the city debt, to incur further liability to aid a railway totally disconnected with the city and more than sixty miles from it; and that the council, in the interest of the citizens, felt it to be their duty to refuse to submit it to the ratepayers.

Held, affirming the judgment of GWYNNE, J., that the council should not be compelled to submit the by-law; and a rule *nisi* for a mandamus was discharged with costs.

Semble, that it was for the council to decide whether the corporation were “interested in securing the construction of the railway;” but that if it

was a question for the Court, the materials before them would not warrant a decision in the affirmative.

Quære, per GWYNNE, J., whether the provisional directors of the Company had any status to warrant their application for such writ.

Semble, that at all events the by-law submitted should contain proper conditions as to the expenditure of the money, &c., as contemplated by the Statute.

ON the 11th day of December, 1874, *Osler*, obtained a rule *nisi* from Morrison, J., sitting alone under the Administration of Justice Act, upon the part of the North Simcoe Railway Company, for a mandamus to compel the Council of the Municipality of the City of Toronto forthwith to submit for the approval of the qualified voters or ratepayers of the municipality of the said corporation, as provided by the Municipal Act for the creation of debts, and as required by the Act 37 Vic., ch. 54, O, the by-law marked D, referred to in the affidavit of James Saurin McMurray, to aid and assist the North Simcoe Railway Company by giving \$100,000 by way of bonus, and to issue debentures therefor, a copy of which was produced among the papers filed.

The facts sufficiently appear from the judgment.

December 2, 1874. The rule was argued before Gwynne, J., sitting alone.

Biggar shewed cause.

Harrison, Q.C., contra. The argument was substantially the same as that on the rehearing, reported post p. 120.

January 29, 1875. GWYNNE, J.—The 37 Vic., ch. 54, O., is an Act incorporating certain persons as the North Simcoe Railway Company, empowering the company to construct a railway of any guage from or near the Town of Barrie, in the County of Simcoe, or from some other point on the line of the Northern Railway of Canada, passing through the Townships of Vespra, Flos, Tiny, and Tay, to the Village of Penetanguishene, or to some other point on the shore of the Penetanguishene Bay, and also with power to build a line of railway from some

point on the main line to the Village of Midland, or to some other point on the shore of Gloucester Bay, now called Midland Bay, situate in the said Township of Tay.

The capital stock of this Company is declared to be \$50,000, with power, however, to increase the same in the manner required by the Railway Act. So soon as \$25,000 of this capital stock is subscribed for, and 10 per cent. paid thereon, then the provisional directors are directed to call a meeting of the shareholders who have paid the 10 per cent. to elect directors; and the *elected* directors are empowered to transfer as much of the stock as may be agreed upon to any contractor for work as paid up stock.

By sec. 23, which is the section under which this application is made, it is enacted that, "Any municipal corporation, or any portion of a municipality, which may be interested in securing the construction of the said railway, or through any part of which, or near which, the railway or works of the said company shall pass or be situate, *may* aid the said company by giving money or debentures, by way of bonus, gift, or loan, or by the guarantee of the municipal corporation, under and subject to the provisions hereinafter contained, which are to be taken as applicable thereto, instead of sections 472, 473, and 474, of the Municipal Institutions Act; provided always, that no such aid shall be given, except after the passing of a by-law for the purpose and the adoption of such by-law by the qualified ratepayers of the municipality or portion of municipality (as the case may be), as provided in the Municipal Act for the creation of debts."

Sec. 24 enacts that, "Such by-law shall be submitted by the municipal council to the vote of the ratepayers in manner following, namely:—

1. The proper petition shall first be presented to the council, expressing the desire to aid the railway, and stating in what way and for what amount, and the council shall within six weeks after the receipt of such petition by the clerk of the municipality, introduce a by-law to the effect petitioned for, and submit the same for the approval of the qualified voters.

2. In the case of a county municipality the petition shall be that of a majority of the reeves and deputy reeves, or of twenty resident freeholders in each of the minor municipalities of the county, who are qualified voters under the Municipal Act.

3. In the case of other municipalities the petition shall be that of a majority of the council thereof, *or* of twenty resident freeholders, being duly qualified voters as aforesaid."

On the 24th day of March, 1874, this Act was passed. By the 7th section of the Act, nine gentlemen therein named are declared to be provisional directors of the said company.

By the 8th section it is provided that, "The said provisional directors, until others shall be named as hereinafter provided, shall constitute the board of directors of the company, five of whom shall be a quorum, with power to fill vacancies thereon; to associate with themselves thereon not more than three other persons, who upon being so named, shall become and be provisional directors of the company equally with themselves."

Their powers are then stated, namely: "To open stock books—to make a call upon the shares subscribed therein—to call a meeting of the subscribers thereto for the election of other directors, as hereinafter provided, and with all such other powers as under the Railway Act or any other law in force in Ontario are vested in such boards."

The 13th section enacts that, "So soon as shares to the amount of \$25,000 of the capital stock of the said company shall have been subscribed, and ten per centum thereof paid into some of the chartered banks, to be designated by the directors, which shall on no account be withdrawn therefrom, unless for the service of the company, the directors shall call a general meeting of the subscribers to the said capital stock, who shall have so paid up ten per centum thereof, for the purpose of electing directors to the said company."

The application for the mandamus is supported by the

affidavit of Mr. James Saurin McMurray, one of the gentlemen named in the Act as one of the provisional directors of the company, who says that at a meeting of the provisional directors named in the said Act of Incorporation, he was *by them* on the 28th day of March, 1874, duly elected president of the said railway company, and has continued to hold the said office of president ever since up to the day of the making of his affidavit, namely, the 8th day of December, 1874.

The special Act does not appear to give any power to the board of provisional directors to elect a president.

The general Railway Act, the provisions of which are incorporated with the special Act, does not contemplate the existence of provisional directors at all. It is to the elected directors of a company that the clauses in that Act entitled, "President and Directors, their Election and Duties" relate; and it is by the board of elected directors that the 41st section of the Railway Act authorizes the election of one of their number as president and another as vice-president. These clauses with others of the general Act are incorporated with the special Act, and so it is to the board of elected directors of this company that the power of electing a president would seem to belong.

Whether any person is or not properly president of the company may be a matter of indifference, but in one particular, and it is with reference to this that I draw attention to these matters, it does seem to be a matter of some importance. For if, as I understand Mr. McMurray's affidavit, he claims to be merely president of the board of provisional directors, that board must yet be in existence; consequently I must infer that \$25,000 of stock in the said company, with the ten per centum thereof required by the Act, has never yet been subscribed.

Indeed, in so far as appears, no stock at all may have been subscribed, and not one of the provisional directors may have become shareholders in the company; and where such very extensive powers and control are asserted over the ordinary functions, duties, and responsibilities

attaching to the office of municipal councillors under the general law of the land, as to convert them from a deliberative assembly, the trusted guardians of the interests of their constituencies, into mere machines to fulfil the requirements of twenty resident freeholders, duly qualified voters of the municipality, it would seem to raise a question of grave importance, and worthy of much consideration, whether it could have been the intention of the Legislature that these powers and this control should be exercised by, or asserted in the interest of a provisional board of directors of a company, which might never be successful enough to obtain any subscribers to its very limited amount of capital stock ; or whether it is not only when the company has so far progressed as to have a duly constituted elected board of directors that these extraordinary powers over the councils of municipal corporations are to be invoked.

It sufficiently appears in the papers filed in support of the application, that a sufficient number of resident freeholders, qualified voters of the City of Toronto, petitioned for the aid now sought to be enforced.

A petition is produced signed by 270 such voters, the prayer of which petition is that the Council of the Municipality of the City of Toronto should introduce a by-law for granting a bonus of \$100,000 to the North Simcoe Railway Company, and submit the same to the qualified voters of the Municipality of the City of Toronto, and in due course pass the same for the purpose of raising the said sum of \$100,000 by the issuing of debentures.

It is also shewn that this petition was presented to the council of the municipality upon the 19th August, 1874.

And also that on the 22nd September, 1874, a by-law to aid and assist the North Simcoe Railway Company by giving \$100,000 to the said company by way of bonus, and to issue debentures therefor, and to authorize the levying of a special rate for the payment of the debentures and interest, was introduced to the council and read a first time. And that on the 28th September the by-law was read a second time.

But it has been also shown by the applicants that on the 19th October, 1874, the following resolution was passed upon a vote of 14 to 7 members of the council, by way of amendment, upon a motion being made to go into committee upon the said by-law :—

“ Resolved,—That in view of the rapid increase of the city debt, and of the large expenditure now urgently required in necessary improvements within the municipality, it would be most unwise to incur further liability and to impose further burdens upon the taxpayer in order to aid a railway totally disconnected with the city and more than sixty miles from it. This council, therefore, in the interest of the citizens, and in order to prevent all doubt, feel it to be their duty to refuse to submit the proposed by-law in aid of the North Simcoe Railway to the people until the decision of some competent Court of law determines that this council has no option in the matter.”

The applicants support their application with the affidavits of twenty ratepayers in the city, who are of opinion that the city is interested in the construction of the proposed railway, and on the other side the application is opposed upon the affidavits of eleven gentlemen members of the council, who declare their belief to be that the city is not interested in its construction, and by the affidavits of 33 others, ratepayers, to the like effect.

The contention of the applicants is, that the council has no deliberative voice whatever in the matter, but that a simple ministerial duty is imposed upon them by the Act incorporating the company, to submit the by-law as prayed for by the petition to the ratepayers to be voted upon by them.

To explain the fact that the by-law had received two readings an affidavit is filed of the clerk of the municipality, who says that for 23 years last past he has been and is familiar with the rules and authorities which govern the proceedings of the council, and he says that the second reading of a by-law by the said council has never been regarded, and is not regarded, by the members of the said council as an affirmation of the principle of the bill, and

that there is no provision to that effect in the by-laws or rules which govern the proceedings of the council.

And that upon the first and second readings of a by-law the preamble only is read, and the enacting clauses of the by-law are not considered until the council goes into committee of the whole.

By virtue of the Railway Clauses Consolidation Act, title "Municipalities," Consol. Stat. C., ch. 66, sec. 75, the clauses of which Act are incorporated with the North Simcoe Railway Company's special Act, municipal corporations in this Province may subscribe for any number of shares in the capital stock of this North Simcoe Railway Company, "or lend to, or guarantee the payment of, any sum of money borrowed by the company from any corporation or person, or endorse or guarantee the payment of any debenture to be issued by the company for the money by them borrowed, and may assess and levy from time to time upon the whole ratable property of the municipality a sufficient sum for them to discharge the debt or engagement so contracted, and for the like purpose may issue debentures payable at such times and for such sums, respectively, not less than twenty dollars, and bearing or not bearing interest, as such municipal corporation thinks meet."

And it is provided by sec. 77, "That no municipal corporation shall subscribe for stock or incur any debt or liability under this (the general) Act, or *the special Act*, unless and until a by-law to that effect has been duly made and adopted with the consent first had of a majority of the qualified electors of the municipality, to be ascertained in the manner determined by the by-law, after public advertisement thereof containing a copy of such proposed by-law, inserted at least four times in each newspaper printed within the limits of the municipality, or if none be printed therein, then in some one or more newspapers printed in the nearest city or town thereto and circulated therein, and also put up in at least four of the most public places in each municipality."

Sec. 196 of the Municipal Institutions Act of 1866,

29-30 Vic., ch. 51, points out the mode of procedure in cases where the assent of the electors is required to a by-law before the final passing thereof.

And the 349th section of the same Act, under the title "Railways," enacts that: "The council of every township, county, city, town, and incorporated village, may pass by-laws:—

1. For subscribing for any number of shares in the capital stock of, or for lending to or guaranteeing the payment of any sum of money borrowed by an incorporated railway company to which the 18th section of the statute 14 & 15 Vic. ch. 51, (the Railway Clauses Consolidation Act,) or the sections of the Consolidated Statute of Canada respecting Railways, numbered 75 to 78, have been or may be made applicable by any special Act;

2. For endorsing or guaranteeing the payment of any debenture to be issued by the company for the money by them borrowed, and for assessing and levying from time to time upon the whole ratable property of the municipality, a sufficient sum to discharge the debt or engagement so contracted;

3. For the issuing, for the like purpose, debentures payable at such times and for such sums respectively not less than \$20, and bearing or not bearing interest, as the municipal council may think meet;

4. For directing the manner and form of signing or endorsing any debenture so issued, endorsed or guaranteed and of countersigning the same, and by what officer the same shall be so signed, endorsed, or countersigned respectively; but no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law before the final passing thereof shall receive the assent of the electors of the municipality in manner provided by this Act." That provision was made by section 196.

Then by the 6th section of the Act of Ontario, 34 Vic., ch. 30, "An Act to amend the Act, intituled 'An Act respecting the Municipal Institutions of Upper Canada,' "

the following sub-section is added to the above section 349 of the Act of 1866, viz:—

“ *For granting bonuses to any railway, and to any person or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures, payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses.*”

These powers were also restricted by the 225th section of the Act of 1866, whereby it was enacted that no Council should assess and levy in any one year more than an aggregate rate of two cents in the dollar on the actual value of the whole ratable property within its jurisdiction, exclusive of school rates.

In the Ontario Statute, 36 Vic., ch. 48, which is an Act passed to amend and consolidate the Acts respecting Municipal Institutions, the 225th sec. of the Act of 1866 is re-enacted in sec. 258, with this proviso added: “That this shall not affect any special provisions to the contrary contained in any Special Act now or hereafter in force.”

The powers of Municipal Councils as to railways, are consolidated in Division xiii., secs. 471 to 476 inclusive.

Sec. 471 enacts that: “The Council of every township, county, city, town, and incorporated village may pass by-laws: 1st. For subscribing for any number of shares in the capital stock of, or for lending to or guaranteeing the payment of any sum of money borrowed by an incorporated Railway Company,” &c., in the precise words of the 29 & 30 Vic., ch. 51, sec. 349, sub-sec. 1.

“2. For endorsing or guaranteeing the payment of any debenture to be issued by the Company for the money by them borrowed,” in the words of sub-sec. 2 of the above sec. 349.

“3. For issuing debentures,” &c., in the words of sub-sec. 3 of the above sec. 349.

“4. For granting bonuses to any Railway Company in aid of such railway, and for issuing debentures in the

same manner as is in the preceding sub-section provided for raising money to meet such bonuses ;” and

“ 5. For directing the manner and form of signing, endorsing,” &c., in the precise words of sub-sec. 4 of the above sec. 349, of the Act of 1866.

Notwithstanding that the above section fully provided for municipalities aiding railways by loan, guarantee, gift, by way of bonus or otherwise, sec. 472 repeats the provision contained in 471, by enacting as follows: “Any municipality * * * which may be interested in securing the construction of a railway or through any part of which or near which the railway or works of any Railway Company shall pass or be situated, *may aid or assist* such Company by *loaning*, or *guaranteeing*, or giving money *by way of bonus*, or other means to the Company, or issuing municipal bonds to or in aid of the Company and otherwise, in such manner and to such extent as such municipality shall think expedient ; Provided always that such aid, *loan*, *bonus*, or *guarantee* shall be given under a by-law for the purpose, to be passed in conformity with the provisions of sec. 231 of this Act.”

Now, the sec. 231 here referred to is the section providing for cases in which the assent of the electors of the municipality to a by-law, before the final passing thereof, is necessary, and is the same section which would have governed in the case of a *loan*, *bonus*, or *guarantee* under the 471st section, if the 472nd section had never been enacted.

By all these clauses referred to, it appears to me to be clear that in passing these General Acts the Legislature never contemplated divesting the Municipal Councillors (who are the legally constituted guardians of the interests of the ratepayers in their municipalities ; and who, from their position and intimacy with the affairs and liabilities of their municipality, are much better qualified than the ratepayers to determine whether or not it is in any given case prudent or proper or expedient to call into action any of the powers conferred by these clauses in aid of a private

Company), of the deliberative functions and duties entrusted to them and imposed upon them, of acting according to the dictates of their consciences and judgment in protecting to the utmost of their abilities the interests of the ratepayers, confided to their special care.

All these sections in the Public General Acts regulating municipal institutions, leave it optional with the Council to give or withhold aid; and in case any aid should be deemed advisable, to determine whether or not it shall be given by way of subscription for stock in the Company, or by way of guarantee of the bonds of the Company, or by way of loan to the Company, or by way of absolute gift or bonus.

In case the Council should, in the unfettered exercise of their deliberative functions, adopt a by-law for any of the above purposes, then the 473rd sec. of 36 Vic., ch. 48, provides a mode of submitting a by-law so adopted to the ratepayers for their adoption, without which the action of the Council would be nugatory.

The 473rd sec. enacts:—"Such by-laws shall be submitted in manner following, namely:—

1. In the case of a County Municipality, by the County Council on a petition of the majority of the reeves and deputy reeves, or of 200 resident freeholders who may be duly qualified voters under the Municipal Act;

2. In the case of other municipalities * * by the councils of such municipalities, on the petition of the majority, or of 50 resident freeholders, being duly qualified voters as aforesaid;

3. And in the case of municipalities which form part of a county municipality, by the council of such county municipality on the petition of 50 resident freeholders, who are duly qualified voters as aforesaid."

Sec. 474 made provision for certain things required to be provided by the by-laws, without which they would be invalid.

In Michaelmas Term, 1873, a question similar to the present one came up before the Court of Queen's Bench, *In*

re Peck and The Corporation of Peterborough, 34 U. C. R. 129, but the case went off upon an objection that no demand or refusal was shewn, so that it cannot assist me in determining this case; but I find that about the time that *Peck and Peterborough* was decided, a public general statute was introduced into the Legislature, and was passed into a law, as ch. 16 of 37 Vic., upon the 24th of March, 1874, for amending the Act respecting municipal institutions, whereby, among other amendments, it is enacted by sec. 22 that the sections 472, 473, and 474, of 36 Vic., ch. 48, are "repealed, but such repeal shall not affect anything legally done under said sections, or any of them, or any proceedings commenced under the said sections or any of them, which proceedings may be continued as if the said sections had not been repealed."

Now I gather from this statute, that in the opinion of the Legislature it was inexpedient that the deliberative functions of Municipal Councils should any longer be fettered by the provisions contained in these sections, if the true construction to be put upon the sections was that they did fetter them in the exercise of their judgments and the conscientious discharge of their duties; yet, strange to say, in this same session of the Legislature the Act incorporating the North Simcoe Railway Company, ch. 54, was passed.

I have already expressed it to be my opinion that the secs. 472, and 473 of 36 Vic., ch. 48, did not fetter the Municipal Councils in the exercise of their deliberate judgment as to whether any by-law in aid of a railway should be passed at all or not, or, if any should be passed, whether the aid should be given in the shape of the subscription of stock, or by way of a loan, guarantee, or gift; and that the operation of these sections was merely to prescribe the mode of submission of the by-law, when deliberately adopted by the Council, to the ratepayers for their adoption.

But if it was, in the judgment of the Legislature, improper or inexpedient that these clauses should be per-

mitted to remain in the Public General Statutes regulating municipal institutions, *à fortiori* it would seem to be improper and inexpedient that a Private Act for incorporating a Private Company (of which or of its contemplated provisions the municipalities to be affected may have had no notice), should contain like clauses, or clauses which are construed to have the effect of impairing and neutralizing to a much greater degree the deliberative functions of these Councils, and of converting them into mere machines to give effect to the requests of the Private Company; yet we find that this Private Act, 36 Vic., ch. 54, in its terms professes to enact the provisions I have above quoted, which the 23rd section of the Act declares are to be taken as applicable instead of secs. 472, 473, and 474, of the Municipal Institutions' Act, which sections the preceding ch. 16 of the Acts of the same session had expunged for ever from the Municipal Institutions' Act, and consequently they formed no part of that Act at the time of the final passing of the Private Act.

Then again, although it is said that the sections of the Private Act are merely to be taken *instead* of sections which no longer form part of the Public General Act, yet the sections of the Private Act go much further in terms than the provisions which are expunged from the Public Act had, in my opinion, gone.

The provisions of the Public Act did not, as I have already expressed my opinion to be, fetter or in any manner impair the right of the Councils, in the exercise of their deliberate judgment, to refuse to grant any aid or to pass any by-law; nor if they should adopt any by-law, did they control the members of the Council as to the shape in which such aid should be granted—namely, whether by subscription of stock, guarantee, loan, or gift; but this Private Act, of the provisions of which, while before the Legislature, the municipalities intended to be affected, may have known nothing, professes to provide that the Company seeking the aid shall itself determine the mode; and that upon a petition being signed by, in one case, 20 free-

holders, instead of 200, and in all other cases by 20, instead of 50, and being presented to the Council, expressing a desire to aid the railway *in a particular manner specified in the petition*, the Council *shall*, within six weeks after receipt of such petition by their clerk, introduce a by-law to the effect petitioned for, and submit the same to the electors for approval. And the contention before me is, that the Council must pass and submit this by-law, although their deliberate conviction should be that the circumstances of the municipality would not warrant the application of its funds to the purpose indicated, and although by so doing they would violate what their consciences declare to be their duty to the ratepayers, whose guardians they are—nay, although they should entertain the conscientious conviction that very serious embarrassment, nay, bankruptcy of the municipality, might ensue upon the aid being granted : in fact, the contention is that *quoad* the passing and submitting the by-law to the electors, the members of Council are mere machines, to be put in motion as the Company and those petitioning in their behalf direct.

I am not surprised that the elected guardians of the interests of the ratepayers should, under these circumstances, refuse to be mere ciphers in the matter, and that they should submit the question to the Court ; and I confess I find great difficulty in putting what, to my own mind, appears a satisfactory and consistent construction upon these apparently inconsistent provisions, contained in a public general statute and a Private Act of the same session.

There is another section in the Private Act which appears very embarrassing, namely, the 30th, which seems to provide that for the purpose of granting aid to this Company, with a limited capital of \$50,000, all municipalities to be affected by the Act may exceed the annual rate of two cents in the dollar, limited by the Municipal Act, and that they may impose a rate to the extent of, but not exceeding, three cents in the dollar.

In view of the very grave and extensive power of inter-

ference with the functions, duties, and responsibilities of the councils of municipal corporations which is asserted and contended for, as converting them from a deliberate body into mere machines to comply with the request of this private company and their promoters, it is very important that no doubt should be entertained as to the intention of the Legislature before the Court should grant a mandamus commanding the members of council to pass a by-law, (an act which ordinarily implies the exercise of deliberate judgment), although by rendering obedience to the order of the Court they should all be obliged to act in a manner which, in the conscientious exercise of their deliberate judgment, they believe to be injurious to the interests of the ratepayers whose guardians they are, and wholly unjustifiable for that reason.

Upon the best consideration which I have been able to give this, which has appeared to me to be a very peculiar case, I have come to the conclusion that—whatever may have been the intention of the Legislature when inserting in this private act apparently more stringent clauses than had been contained in the clauses in the stead of which they are professed to be enacted, while the clauses instead of which they have been enacted were by chapter 16 of the same session expunged from the general Act—I am not warranted under the circumstances of this case to grant a writ which would so overrule, as it apparently would, the consciences of a majority of the councillors of the municipality of the City of Toronto, composed as that council is, no doubt, of men much more competent, and necessarily so from their intimacy with the finances of the city, than the ratepayers can be to judge of what is the interest of the city and of its inhabitants.

The 23rd section of the Act 37 Vic., ch. 54, under which this application is made, limits the application of that section and of the subsequent one to municipal corporations “which may be interested in securing the construction of the said railway, *or* through any part of which, *or* near which, the railway or works of the said company shall pass or be situate.”

The railway authorized to be constructed is a railway from or near the town of Barrie, in the county of Simcoe, or from some other point on the line of the Northern Railway of Canada, passing through the townships of Vespra, Flos, Tiny, and Tay, to the village of Penetanguishene, or to some other point on the shore of Penetanguishene Bay, and also with power to build a line of railway from some point on the main line to the village of Midland, or to some other point on the shore of Gloucester Bay, now called Midland Bay, situate in the said township of Tay.

This Act cannot in any way affect the Municipal Corporation of the City of Toronto unless that corporation is one which is interested in the construction of the said railway. Whether it is so or not is, in my opinion, a point which must be decided before the railway company or any persons on its behalf can have any right to call upon the municipal council to pass the by-law which they are required by the petition in this case to pass; that is a point which is not, in my opinion, to be submitted with the by-law to the rate-payers.

Mr. Harrison, Q. C., in the argument before me, contended that it was a point to be decided by me.

I cannot concur in this suggestion. No such jurisdiction is in my opinion conferred upon me, and if it were I certainly should not exercise it to declare that the corporation is interested in that in which the municipal councillors of the corporation by a majority of two to one declare that in their opinion it is not.

A case might arise in which the council might decide that the corporation was interested, which decision might be so flagrantly wrong that a bill in Chancery to restrain the corporation from proceeding upon such a decision might be sustained; but in such case evidence would be entered into, and the case would be brought to a hearing in the ordinary mode; but nothing could in my opinion justify me in deciding that the corporation should pass a by-law to impose a liability upon the ratepayers, when the constituted guardians of the interests of the citizens

declare they are convinced such liability should not be imposed or incurred.

But it is argued that in the case before me the by-law has received two readings in the council, and that it contains a recital that the City of Toronto is interested in securing a railway connection with the townships of Vespra, Flos, Tiny, and Tay, and with the territory of Parry Sound.

The affidavit of Mr. *Radcliff*, who has been connected with the corporation for upwards of twenty years, and as clerk of the council is familiar with its mode of procedure, satisfies me that, whether the mode of procedure adopted by the council in passing by-laws be or not a prudent course, a second reading of a by-law is in practice a mere formal proceeding; and I find that as soon as the motion in council was made to go into committee upon the by-law, which, according to the procedure of the council, is the first proceeding which is not merely formal, the council passed the resolution above quoted. Moreover, I cannot see that I have any right to interfere with the action of the council in undoing anything which it may have already done, so long as the case is in deliberation, and has not reached that point when the next step is submission of the adopted by-law to the ratepayers for their approval.

The motion before me is for a mandamus to compel the council to pass the by-law, a draft of which is produced before me. This draft contains no conditions whatever, such as the council might desire to impose calculated to insure the construction of the road, if the corporation is in fact interested in its construction, and restraining the delivery of the money to the company until the road shall have reached such a state, and within such limited time, as they may think fit to impose as a condition of the aid being granted.

Under no circumstances would I be justified in compelling, if I have the jurisdiction, the council of the city to pass a by-law in the bald terms of the draft before me.

My attention has also been drawn to an Act of the last

session of the Provincial Legislature, 38 Vic. ch. 53, to amend the Act incorporating the North Simcoe Railway Company, whereby it is enacted that the company shall have power and authority *to extend* the construction of their railway from some point on the line of the proposed road of the said company, in the township of Vespra, to some point on the line or lines of the Toronto, Grey, and Bruce Railway, or the Northern Railway of Canada, or any or all other railways in the County of York or Peel; and a map has been furnished me shewing the line of the proposed extension contemplated to be from Barrie to the City of Toronto, on a line parallel or nearly so with the Northern Railway.

This has been supplied for the purpose of sustaining the contention that the City of Toronto is interested in the construction of the railway. That is a point which, as I have said, I do not assume to decide. It is a matter proper for the consideration of the municipal councillors in governing their deliberations, who, if it be true, as I think was suggested in the argument, that the city is a stockholder in the Northern Railway, may, for all I know, arrive at the conclusion that, if the road is indeed to be constructed as proposed, this affords the strongest reason for holding that the City of Toronto is *interested in preventing* the construction of this railway.

Moreover, it is not to such a railway as is indicated on the map thus furnished to me that the by-law which I am asked to compel the corporation to submit to the rate-payers relates.

If I had not arrived at the conclusion at which after much consideration I have arrived, I should perhaps have required a further argument upon the point, whether or not the provisional directors of this company have any status to warrant this application being made on their behalf. It seems to me as at present advised very questionable. Their powers seem to be limited to putting the Act into operation until \$25,000—that is to say, one-half of the whole named capital stock of the company—shall be subscribed, and 10

per centum thereon is paid. Then the only power apparently remaining in the provisional directors is to call a meeting of stockholders to supplant them by the *election* of directors from among the stockholders, which, for aught that appears, the provisional directors may never be ; and indeed the \$25,000 might never be subscribed, in which case, I presume that under the provision of the 117th section of the General Railway Act, which is incorporated with the special Act, after the expiration of three years from the passing of the special Act the corporate existence and powers of the company would cease.

But I rest my judgment upon the former ground : namely, that in my judgment I ought not, if I have the jurisdiction, to interfere to order the Municipal Councillors of the city to aid a project as in the interest of the city, in which, in the conscientious exercise of their deliberate judgment, a majority believes not only that the city is not interested, but that to grant the aid would be detrimental to the interests of the ratepayers, whose guardians the councillors are.

The rule, therefore, will be discharged with costs.

Rule discharged with costs.

In Hilary Term, 1875, *Harrison*, Q. C., obtained a rule *nisi* from the full Court, by way of appeal, to review and rehear the foregoing judgment.

Feb. 11, 1875, the case was argued before the full Court. *Harrison*, Q.C., for the Appeal. The case of *West Gwillimbury v. Simcoe*, 20 Grant 211, shews that the Court of Chancery would not relieve a municipality in such a case as this. The clause that is objected to is not wrong in principle—it is a return to first principles—and a similar clause is contained in almost every Railway Act of Ontario passed last session : See 37 Vic., ch. 38, sec. 24 ; ch. 43, sec. 22 ; ch. 46, sec. 17 ; ch.

47, sec. 23; ch. 48, sec. 14; ch. 50, sec. 16; ch. 56, sec. 17; ch. 57, sec. 4; ch. 59, sec. 14; ch. 62, sec. 21; ch. 63, sec. 3; and in the Act in question, ch. 54, sec. 24. Similar clauses are contained in every Act of the previous session. The Legislature is fully committed to the principle. The people are the guardians of their own pockets. This principle underlies the Dunkin Act, and there is nothing in it to shock or alarm any one: *McAvoy v. The Municipality of Sarnia*, 12 U. C. R. 99, 102. See also *Re Peck and The Corporation of Peterborough*, 34 U. C. R. 129; *Cincinnati, Wilmington and Zanesville R. W. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77. The council have taken \$1,500 of the Company's money as a deposit under the Statute, for the purpose of taking the vote, and they are estopped from denying that they are interested in the project of the railway: *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642; *Hill v. Manchester Water Works*, 2 B. & A. 544; *Re Bahia and San Francisco R. W. Co. (Limited)*, L. R. 3 Q. B. 584; *Regina v. Shropshire Union R. W. and Canal Co.*, L. R. 8 Q. B. 420; *Michie v. City of Toronto*, 11 C. P. 379. See also, *Bogart v. Town Council of Belleville*, 6 C. P. 425; *Regina v. Commissioners for paving and lighting the City of Dublin*, 9 Ir. L. R. 458.

Biggar, contra. The Irish case quoted by Mr. Harrison does not apply, as here a peremptory writ of mandamus is asked to which there can be no return but compliance. The applicants were never in a position to ask for the writ, as they did not comply with the prerequisites in time: *Tapping*, 294, *Harrison's Mun. Man.* 485 i.; *Luther v. Wood*, 19 Grant 348. The deposit was not actually paid in till two weeks after we were bound to submit the by-law. Next, no demand was made on the council now existing: *Burdett v. Sawyer*, 2 P. R. 398. Both the demand and refusal must appear in the writ: *Angell & Ames*, 9th ed., sec. 719, *Tapping*, 308. On the merits the judgment of the Court below is right. The Legislature has shewn by the passing of the 37 Vic. ch. 16, sec. 22 an intention to leave the question of railway bonuses entirely to the discretion of

the councils of the municipalities affected. The earlier Railway Acts referred to by Mr. Harrison and the Municipal Act of 1873, 36 Vic. ch. 48, secs. 471, 474, compelled the councils to act upon the petition of a sufficient number of ratepayers. At first 200 petitioners were required in counties and 50 in townships, but this number having been steadily reduced by the influence of the railway corporations the whole system was swept away by the 37 Vic. ch. 16, which passed through the Legislature after this company's private Act, 37 Vic. ch. 54, sec. 23, and repealed it in so far as it was inconsistent with the general enactment. The Company's Act confers new and extraordinary powers—secs. 24, 30, 33,—and will therefore be very strictly construed: *Potter's Dwaris*, 207, 256, 257.

It is not every municipality which can aid this railway but only one which is "*interested in securing* its construction." This implies more than a general interest in seeing it built, such as Toronto has in the Pacific Railway or in the deepening of the St. Lawrence canals. It requires (1) that the road will benefit the city; (2) that the city's aid is necessary to secure its construction, and (3) that the benefit reasonably to be expected is not disproportionate to the aid asked.

The question whether any particular municipality is within the purview of the Act must be determined before it can assume to aid the railway, and for this no tribunal can be so fit as the municipal council who must know most about the circumstances, and who are limited as to the rate of taxation which may be imposed: 36 Vic., ch. 48, secs. 258, 473; 37 Vic. ch. 54, secs. 24, 30. This decision must be made before the by-law is submitted: *Re Peck and the Corporation of Peterborough*, 34 U. C. R. 129,—and not after the vote was taken: 27 Vic. ch. 54 sec. 32.

The by-law must be in the same terms and for the same amount as the petition: *West Gwillimbury v. Simcoe*, 20 Grant 218. Yet if this rule is granted we must pass it as it stands: Consol. Stat. U. C. ch. 23, sec. 4, and a bare majority of the votes cast may impose the burden on the ratepayers (37 Vic. ch. 54 sec. 33: *Harrison's Mun. Man.* 3rd ed. 117.

The question of interest or no interest is one which cannot be tried here on affidavit, it has already been determined in the proper forum, and that determination will not be reviewed here: *Dillon*, 2nd ed., 704. The proposed railway is a rival to the Northern Railway, in which the city is a stockholder and deeply interested. If the mandamus is refused the applicant can still obtain all they are entitled to by reducing their claim to a figure more nearly equal to the possible interest of Toronto in the North Simcoe Railway.

June 19, 1875, RICHARDS, C. J., delivered the judgment of the Court.

In this matter, reheard before the full Court in Hilary Term last, we are asked to overrule the decision of Mr. Justice Gwynne in discharging the rule *nisi* for a mandamus heard before him, in which he gave his judgment sitting as a single Judge, pursuant to the Administration of Justice Act of 1874.

I have gone over the carefully considered judgment of the learned Judge, and have arrived at the conclusion that we ought not to discharge the rule setting aside the rule *nisi* for a mandamus in this matter.

Without following the learned Judge through the various points discussed by him in his judgment, or expressing any opinion how far the repealed sections of the Municipal Act referred to by him would have *compelled* a Municipal Corporation, when applied to in the manner there pointed out, to pass a by-law giving a bonus to a railway which might pass through part of the municipality, or near which the works of the Company might be situated, and submit the same for the approval of the ratepayers, though the governing body of the municipality might be of opinion it was not for the interest of the municipality to give such bonus to have the railway constructed; but where, as in the case before us, the railway does not pass through any part of the municipality, and the railway works of the Company are not situated, nor do not pass, near the municipality, it seems to me that the question whether the municipality *is interested* in securing the

construction of the railway, ought to be established with all reasonable certainty before a municipality can be compelled, at the instance of a Railway Company, to pass a by-law submitting the question to the ratepayers whether \$100,000 shall be given to such railway or not.

We apprehend the quantum of interest which the municipality has in securing the construction of the railway, must be somewhat in proportion to the money they are asked to give for that object and the ability to give, considering the other claims and demands on the Corporation.

These matters must be considered before the question of whether the Corporation really has an interest in securing the construction of the railway can be properly decided; and who can be supposed to have the knowledge of the financial condition of the Corporation, and of its wants and requirements in other respects, to enable a proper decision to be arrived at, but the governing body of the Corporation?

The argument that it is the money of the people that will be paid to the railway, and that the people are the best judges of whether it is for their interest that the railway should be constructed, is somewhat plausible; but when you have to take into consideration the financial condition of a large city, whose debt is increasing from year to year—the papers produced on this application, shewing an increase of debt in four years of a million and a half of dollars—and in relation to which large increased expenditure is required for such purposes as sewerage, waterworks, repair of streets and roads, it is very obvious that the details of these matters cannot be entered into before the whole body of the people, or even by calling small meetings,—the information needed for a proper consideration of the subject cannot be obtained by or communicated to them.

The governing body of the Corporation are much better fitted to consider the question; and unless the Legislature defines more clearly than they have done in the statute before us, that the decision of the question as to whether the Corporation “are interested in securing the construction of this railway,” is to be taken away from the governing

body of the municipality, we shall feel bound to hold that they cannot be compelled to pass a by-law giving a bonus of \$100,000 to a railway, no portion of the line of which, according to the language of the affidavits filed on behalf of the Corporation, "will pass through the City of Toronto, or within sixty miles thereof."

We can imagine the City of Toronto might be interested in a certain way in securing the construction of a railway from the head of Lake Superior to Winnipeg, for if the steamers that run to the head of Lake Superior come to Collingwood and bring their freights and passengers there, and this freight and the passengers come to Toronto, this city would be interested in securing the construction of such a road.

We doubt, however, if the directors of the road demanded that the City Corporation should pass a by-law to give them a million of dollars bonus towards the road, and have the same submitted to the people, whether it would be seriously contended the Corporation were bound to do so, though petitioned for by 20 resident freeholders.

The argument of the Railway Company amounts to this—that if 20 resident freeholders of the City of Toronto consider the city interested in securing the construction of their road, and petition the Corporation of the city to give the Company a bonus of half a million of dollars (if the other preliminaries to the passing of the by-law have been properly attended to), the Corporation must pass the by-law and submit it to the people, if 500 people petitioned against it, and every member of the Corporation thought it would destroy the credit of the city, and prevent their raising money for such improvements as were absolutely necessary to be made to preserve the health of the citizens, and prevent the Corporation from being constantly exposed to actions for injuries arising from the public streets being out of repair.

If the Legislature mean this, we think they should declare their meaning in a more unmistakable manner than has been done in the Act before us.

If the governing body of the corporation are not the

parties to decide whether the corporation is interested in *securing* the construction of this railway, and this duty is thrown upon the Court, the only conclusion we can arrive at from the materials placed before us, is, that we cannot say it is for the *interest* of the corporation to secure the construction of this railway on the terms proposed in the by-law which we are asked to compel the corporation to submit for the approval of the ratepayers. Nor can we see from the materials before us that this municipality is interested in securing the construction of this railway, in the sense which was contemplated by the Legislature in passing the charter.

In one view the city would be interested in the construction of many railways of the kind hereinbefore referred to though very distant from the city, but the promoters of this road would hardly say the corporation would be bound to submit a by-law to the people to give them a bonus.

Take the Midland Railway. The extension of their line from Woodville, where it crosses the Toronto and Nipissing Railway, to Orillia and to Midland City, would be for the interest of Toronto to a certain extent, for it does and probably will continue to bring much trade to Toronto by way of the Nipissing road and other roads, and connections may be constructed in which this city would be interested, but as to which the interest would not be so great as to warrant the giving of a large bonus to secure the construction of the road.

My brother Gwynne refers to the fact that the draft by-law contains no conditions securing the construction of the road, and no provision as to the money only being payable when the amount to be paid would secure the construction of the road, nor any provision as to what portions of the road the money to be raised is to be applied to construct, and considers he would not be justified under any circumstances in compelling the corporation to pass a by-law in the bald terms proposed.

The 37th section of the Act incorporating the North Simcoe Railway refers to the money to be raised on the debentures issued by the municipality being deposited by the trustees in some of the chartered banks, to be paid out to the

company from time to time on the certificate of the chief engineer of the railway in the form in schedule B of the Act, *setting out the portion of the railway to which the money to be paid out, is to be applied*, and that the sum so certified for is in pursuance of the terms and conditions of the by-law ; and the engineer shall not wrongfully grant such certificate under the penalty of \$100.

Section 44 contemplates an agreement by which the company is to expend the amount of the bonus granted in constructing works within the municipality.

The form of certificate in schedule B to be given by the engineer is to the effect that “ \$ is required to be expended in constructing the portion of the line extending from mile No. to mile No. , and that payment should be made to the company of such amount from the municipal trust account, the same being in pursuance of the terms and conditions of the by-law of the municipality of the of .”

These sections seem to contemplate that the by-law will impose some limitation as to the expenditure of the money.

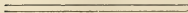
It may be said that the corporation of the City of Toronto have refused to pass any by-law, and therefore the omission of any provision to protect the interests of the city in the expenditure of the money ought not now to be urged, for the railway would be quite willing that any reasonable provision should be made, or would now enter into an agreement according to the spirit of the 44th section of their Act, though they could not comply with the letter of the section.

However this may be, we are of opinion, on the other ground, that the corporation have a right to consider whether the city are interested in securing the construction of the railway, before they can be compelled to submit the by-law referred to ; and if the Court are to decide this question instead of the corporation, that we are not prepared on the material before us to say that the municipality is so interested in securing the construction of the railway as to compel the corporation to submit this by-law for the consideration of the ratepayers.

I do not see that the passing of the statute referred to since this by-law was submitted to the corporation, and after the rule *nisi* for the mandamus was moved and granted, can make any difference. There is nothing to shew that under the amended charter the railway will pass through or any of their works be situate within the City of Toronto. When they have decided that that shall be the case, and the citizens then think it desirable to have a competing line with the Northern Railway, and petition the corporation to aid such line, it will be time enough to decide whether the corporation will be compelled to grant such aid.

We think the rule should be discharged with costs.

Rule discharged with costs.



HILARY TERM, 38 VICTORIA, 1875.

(February 1st to February 13th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

REGINA V. PATTESON.

Indictment for libel, 37 Vic., ch. 38, sec. 11, D.—Causing jurors to stand aside.

The 37 Vict. ch. 38, sec. 11, D, enacts that the right of the Crown to cause jurors to stand aside shall not be exercised “on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel.” *Held*, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels; and that the fact of the prosecution being conducted by a counsel appointed by and representing the Attorney-General would make no difference.

The judge, at the trial, allowed the Crown counsel in such a case to direct jurors to stand aside, but, after the verdict and sentence, entertaining doubts, he reserved a case for the opinion of this Court as to the propriety of his having permitted it.

Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute, Consol. Stat U. C., ch. 112.

Crown case reserved.

This was an indictment for the publication of a defamatory libel, tried before Burton, J., at the last Fall Assizes for the City of Toronto. The defendant was convicted, and execution on the judgment respited until the opinion of this Court should be taken upon the following case stated by the learned Judge :—

CASE.

"Thomas C. Patteson was tried and convicted before me at the last Assizes for the County of York, on an indictment for printing and publishing a defamatory libel; to which he pleaded not guilty, and that the several matters charged in the libel were true, and that it was for the public benefit that they should be published; to which the Crown replied generally denying the whole thereof.

"On the jury being called the learned counsel for the Crown directed a juror to stand aside, which was objected to by the counsel for the defendant on the ground that this was in fact an indictment by a private prosecutor, and that under the provisions of the 37 Vic., ch. 38, sec. 11, D, the right of the Crown could not be exercised.

"I inquired of the learned Queen's counsel who conducted the prosecution whether he prosecuted on behalf or at the instance of the party libelled as a private prosecutor, or whether the prosecution was instituted or proceeded with at the instance of the Government as a public prosecution; and being informed that he appeared there on the part of the Government, and that it was not in the nature of a private prosecution, I considered that I had no alternative, looking at the 11th, 12th and 13th sections of the Act, but to allow the right claimed; and I accordingly so ruled, and several jurors were in consequence ordered by the counsel for the Crown to stand aside.

"The trial proceeded and the defendant was convicted, but his counsel took an objection at the close of the case for the prosecution, that as it was shewn that the party libelled was not in the country at the time of the publication the indictment could not be sustained, although the evidence shewed that his usual residence was in England, that he had come here with emigrants, and that he had left for a temporary purpose and gone to England *animo revertendi*. I overruled the objection.

"The article complained of and forming the subject of the indictment consisted of a series of distinct and separate charges, each of which were justified; and I directed the jury that they would have to consider whether each of them was libellous, and if libellous, was the truth of all the material allegations as to that particular portion made out to their satisfaction; and that if any portion of the article forming such distinct and separate charge, and which they found to be libellous, was not so justified, they should find a verdict for the Crown. This was objected to on the part

of the learned counsel for the defendant, who contended that under the recent Act this was not necessary.

"I sentenced the defendant to a fine of \$200, but on being called upon to say whether he had anything to urge against the judgment of the Court being pronounced upon him these several objections were renewed, and I was urged to reserve them; and although the counsel for the Crown contended that it was then too late to do so, and that the remedy, if any, as to the alleged mis-trial, was by writ of error, I decided to reserve the three questions for the decision of the Judges of Her Majesty's Court of Queen's Bench.

"If the Court should be of opinion that I was wrong under the circumstances in allowing the right of the Crown to set aside the jurors, or that the publication of a libel upon a person temporarily absent from the Province is not indictable, or that I was wrong in directing the jury as above stated, the verdict is to be set aside, or otherwise not, and the sentence to be enforced."

The indictment contained two counts. The first count setting out that the defendant, contriving, &c., to injure, vilify and prejudice one Creasy John Whellams, and to deprive him of his good name, fame, credit and reputation, &c., at the city of Toronto, &c., unlawfully, &c., did print and publish and cause to be printed, &c., a false, scandalous, malicious and defamatory libel of and concerning the said Whellams in a certain newspaper called the *Mail*. The count set out the article, which contained various libellous charges, with the necessary innuendoes—to the great damage, scandal and disgrace of the said Whellams, &c.

The second count was similar, alleging the libel to have been published in the *Weekly Mail*.

The defendant pleaded not guilty, and a special plea under the Statute, as follows:—that the alleged defamatory libel and matters charged against him the said Thomas Charles Patteson, in and by the said indictment, as written and published by him the said Thomas Charles Patteson, of and concerning the said Creasy John Whellams are true; and further, that it was for the public benefit that the said

alleged defamatory libel and matters charged in and by the said indictment, as written and published of and concerning the said Creasy John Whellams should be written and published, because the said Creasy John Whellams was appointed by the Government of the Province of Ontario, and paid out of the public funds of the Province, as an agent for the purpose of bringing emigrants to the said province, and inducing emigrants to come to the said province from Great Britain and Ireland; and it was for the public benefit that emigrants should be induced to come to this Dominion, and that the person employed in that capacity should be of reputable and respectable character to accomplish this purpose, and should not be guilty of the matters and things charged against the said Creasy John Whellams in the said alleged defamatory libel, but of which the said Creasy John Whellams was guilty, and his character being known in Great Britain and Ireland would deter persons wishing to emigrate from relying on his representations, and therefore that public attention should be drawn to his character and employment, so as to induce the Government of Ontario to withdraw him from the said position; whereby and by reason whereof it was and is for the public benefit that all and every the said alleged defamatory libel and matters charged in and by the said indictment should be published. And this, the said Thomas Charles Patteson is ready to verify; wherefore he prays judgment of the Court here, and that he may be dismissed and discharged of the premises in the said indictment above specified.

Replication by Kenneth McKenzie, Q.C., who prosecutes for our Lady the Queen, taking issue on the first plea;—and as to the second plea, denying the whole of such second plea, and averring that the matters therein were not true in substance and effect, &c., and concluding to the country.

Issue.

December 2, 1874. *M. C. Cameron*, Q. C., and *C. Robinson*, Q. C., for the prisoner. This is a private

prosecution, and the right to cause jurors to stand aside under 37 Vic. ch. 38, sec. 11, D, cannot be exercised. Sec. 12 of the Act gives the prosecutor in this case costs if he succeeds, and makes him liable for them if he fails. The Crown cannot deprive the private prosecutor of his costs under this section, merely by the Crown counsel stating that he acts for the Crown and not for the private prosecutor. It follows, then, if the prosecutor is here entitled to the costs, that he is a private prosecutor. Moreover, there cannot be a public prosecutor for a libel of this kind. There is a distinction made where the libel is seditious or blasphemous—there only the prosecution is public : *Regina v. Duffy*, Cox C. C. 45.

This enactment as to causing jurors to stand aside appears to be new, and no cases are to be found on the point. 37 Vic. ch. 38, is a re-enactment of Consol. Stat. U. C. ch. 103, but section 11 has been added. The law as to challenges is laid down in *Mansell v. Regina*, 8 E. & B. 54; 1 *Bishop's* Crim. Proc., 2d ed., sec. 931, *et seq.* There is no legal proof that the Attorney General is represented in this case to the full extent of his powers. Something more than the counsel's statement in Court is needed. The counsel could not enter a *nolle prosequi* without the written authority of the Attorney General. They referred to *Stephen's* Crim. Law, ch. 5, p. 155; *Entick v. Carrington*, 19 Howell's State Trials, 1057; *Regina v. Simpson*, 10 U. C. L. J. 220; *Starkie* on Libel, 3rd ed., 659; *Regina v. Peltier*, 28 Howell's State Trials, 529; *Cooke* on Defamation, 80; *Regina v. Latimer*, 15 Q. B. 1077; *Holt* on Libel, 2d ed., sec. 78; *Rex v. D'Eon*, 1 W. Bl. 510.

An indictment, it is said, will not lie for a libel against a person out of the jurisdiction, unless in the case of a foreigner of distinction: *Woolrych* Criminal Law, 1139. The indictment lies on the assumption that a libel tends to provoke a breach of the peace, and there can be no danger of this in the case of a foreigner of no special distinction residing out of the jurisdiction. As to the third point, the direction of the learned Judge at the trial was

not correct under sec. 4 of the Act, which makes the jury judges of the whole case.

Mackenzie, Q.C., contra. If the learned Judge at the trial was wrong in his direction to the jury, as pointed out by the third objection, that might be a ground for a *venire de novo*, on the case being moved up by *certiorari*. The case of *Regina v. Newman*, 1 E. & B. 558, however, decides that the justification must be proved as to each libel before the verdict could be given for the defendant. As Lord Campbell said in that case, "the only function allotted to the jury is to say whether the whole plea is proved or not." Common sense would lead to the same conclusion. Suppose a prisoner indicted for publishing of a party that he had been guilty of arson at A., burglary at B., larceny at C., and embezzlement at D., that the defendant pleaded general justification, and only succeeded in proving the embezzlement, the verdict would be for the Crown, though, in sentencing the prisoner the fact that the party had been guilty of one crime would not be overlooked. The sections of our Act are substantially the same as those under which *Regina v. Newman*, 1 E. & B. 558, was determined; and it is, therefore, a clear authority here.

As to the objection that the person libelled was living out of the jurisdiction, and so no indictment for libel would lie as to him, it is perhaps made for the first time, and the law as contended for the prisoner would be contrary to the liberal spirit of Canadian Legislation. It would also infringe upon the principle upon which the indictment lies. It is on the ground that libels tend to a breach of the peace, and surely in Canada, divided in many places by only an imaginary line from the United States, it would be absurd to say that a libel on a foreigner might not be as readily provocative of a breach of the peace as one on a citizen of Canada. The passage referred to in *Woolrych*, on examination, will be found no authority against the Crown. He referred to *Cole* on Criminal Information, 53; *Rex v. Haswell*, 1 Doug. 387, 389, 390; *Cooke* on Defamation, 209.

As to the first question reserved, this objection was overruled at the trial when taken without any reservation, and the prisoner's counsel having failed to ask then to have it reserved, the objection must be considered as waived; and after verdict in such a case, the Court cannot reserve the question without the consent of the Crown, which was not given here. This was not "a question of law which arose on the trial" within the Consol. Stat. U. C., ch. 112: *Regina v. Mellor*, 1 Dears. & B. C. C. 468; *Mansell v. Regina*, 8 E. & B. 54; *Whelan v. Regina*, 28 U. C. R. 2. The question of challenge is not a ground for a new trial, but for a *venire de novo*, and each challenge should be in writing and subject to counter plea or demurrer: *Rex v. Edmonds*, 4 B. & Al. 471; *Rex v. Worcester*, Skinner 101; *Regina v. Whelan*, 28 U. C. R. 108. The effect of these cases is to shew that if the defendant did not take the steps at the trial to counter plead or demur—so that the judgment of the Court below might appear here—he waived his right to further objection. The 37 Vic. ch. 38, sec. 11, D., uses the words "private prosecutor," thus recognizing the existence of a "public prosecutor," and the meaning of the statute is that when the private prosecutor prosecutes, the right to cause the jurors to stand aside shall not be exercised, but when a public prosecutor intervenes the rule is as before the statute. As to the distinction between private and public prosecutor, see *Rex v. Wilkes*, 4 Burr. 2570; *Cole on Information*, 9; *Archbold Crim. Pl.*, 17th ed., 108 *et seq.* The Act respecting County Attorneys, Consol. Stat. U. C. ch. 106, has virtually abolished private prosecutions, and a private prosecutor is seldom heard of. The County Attorney, in fact, acts as public prosecutor. The papers here were drawn up as on a public prosecution and for the Crown, and so signed by counsel, and not at all as on behalf of a private prosecutor. The offence in this case was committed before 37 Vic. ch. 38 was passed, and so in respect to this offence the Act is *ex post facto*. It should have a strict interpretation.

March 2, 1875, MORRISON, J.—The first question submitted by the learned Judge for our consideration is, whether the counsel who conducted the prosecution on the trial of the defendant, and who, as stated in the case, informed the Court that he appeared on the part of the Government (meaning, we will assume, the Crown or the Attorney-General), was entitled to cause jurors who were called on the trial of the defendant to stand aside.

In order to determine the point so raised, we have to say what is the construction to be put on the 11th section of the Dominion Act, 37 Vic., ch. 38. Prior to that statute it is clear that on trials for misdemeanours the counsel acting for the Crown could direct jurors to stand aside until the panel was gone through, without assigning any cause of challenge; but the Crown was not entitled to any peremptory challenges.

This latter practice, however, was by the 38th sec. of 32 & 33 Vic., ch. 29, relaxed in favour of the Crown, which enacted that in all criminal cases, including misdemeanours, four jurors might be peremptorily challenged on the part of the Crown.

The preamble of 37 Vic., ch. 38, the statute in question, recites, that "it is expedient that the law respecting the crime of libel should in all respects be uniform throughout all portions of Canada; and for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty," it was enacted, &c.

This preamble and the provisions of the statute, with the exception of the 11th section, are substantially the same as those contained in the Imperial statute, 6 & 7 Vic., ch. 96, from which our statute of the late Province of Canada was taken, and is now extended by 37 Vic. to the whole Dominion.

During the argument the learned counsel for the Crown referred us to numerous authorities bearing on the office and the rights and privileges of the Attorney General and counsel representing him at trials for criminal offences;

but it seems to me that the counsel for the Crown misconceived the contention of the counsel for the defendant. The question is not so much what rights or privileges appertain to the office of Attorney General, but whether a right of the Crown which existed prior to the passing of 37 Vic., to cause jurors to stand aside in cases of prosecution for defamatory libel, was entirely taken away by the 11th section of the statute.

The language of the Act is express, and in my judgment very plain, and as clear as words can make it. The words of sec. 11 are: "The right of the Crown to cause any juror to stand aside until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel."

The preamble of the Act, and all its provisions point to, and deal with only one class of libels, viz., defamatory libels—libels reflecting on individuals. The term defamatory libel used in the statute is one which is ordinarily used in text books and authorities as applicable to and meaning libels reflecting on private persons, as contradistinguished from seditious or blasphemous libels, or libels reflecting on the administration of justice. It is quite clear that the Imperial Statute, 6 & 7 Vic., which our Act followed, was intended to apply and is only applicable to libels on individuals.

The case of *Regina v. Charles Gavan Duffy*, 2 Cox C. C. 45, to which we were referred by Mr. Robinson, is an authority to that effect. In that case the defendant was indicted for the publication of a seditious libel, to which he pleaded a plea justifying the publication under the statute 6 & 7 Vic., ch. 96, which plea was demurred to. It was there contended by the defendant's counsel that the statute was not confined to any class of libels. The Attorney General contended that the statute was confined to the case of private libels prosecuted criminally, and not applicable to blasphemous or seditious libels.

Crampton, J., a very able Judge, in giving judgment

said, p. 49: "I concur in the opinion pronounced by my Lord Chief Justice and my brother Burton, and entertained also by my brother Perrin. * * It is perfectly clear that, upon the grounds which have been urged by the Attorney General, the defendant's plea must be overruled. In the first place, the case does not come within the terms of this Act of Parliament. The indictment charges the publication to be a seditious and defamatory libel; now my opinion coincides with that of the rest of the Court, that this statute is applicable only to personal libels—it would be narrowing it too much, I think, to say that it only applied to private libels. The justification allowed by this statute to be put in is just such a one as would be a justification in a civil action for libel, before the statute, shewing that it was personal libels which were intended by the Legislature to be affected by the Act. But it is said, why use the words 'private prosecution' in the eighth section, unless to distinguish such from public prosecutions, and unless public prosecutions also were referred to? Now I apprehend that a very sensible reason may be assigned for the use of these words. The 8th sec. 6 & 7 Vic., ch. 96, says, 'In the case of any indictment, or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea.' Now, why say this, if it was intended to refer to Crown prosecutions for the Crown neither takes or gives costs? But the Attorney General may, and often does, institute a prosecution for the defamation of an individual of high rank or authority, as the Lord Lieutenant, suppose, or the Lord Chancellor and if in such case the issue be found for the prosecutor, he shall be entitled to his costs, or the defendant shall be

entitled to his, if the issue be found for him ; that appears to be the reason why these words were used ; but I do not think that seditious libels were contemplated by the Legislature in making this enactment."

And Perrin, J., said, p. 50 : "It is quite clear that this Act refers only to defamatory libels either of public or private persons."

And Mr. *Archbold*, in his *Pleading and Evidence in Criminal Cases*, 17th ed., 774, says the statute applies to private and personal libels only.

That the intention of the framers of the statute was to limit its provisions to private libels is clearly shewn by a reference to the evidence given before the Committee of the House of Lords, and the report upon which the statute was introduced : *Cooke's Law of Defamation*, Appr., p. 471. The witnesses examined were the Lord Chancellor Brougham, Lords Denman, Abinger, and Campbell. The evidence and the reports all point to one conclusion, that the Act was only intended to apply to private libels.

In the report of the Lords' Committee appear these words : "The Committee have thought that it would be better to confine their proposed amendments of the law to defamation and private libel." Again, "But in coming to the subject of defamation and private libel the Committee are of opinion the various alterations in the existing law are imperatively required, both for the safeguard of character and the protection from vexatious proceedings of those engaged in communicating useful information to the public."

And in the various resolutions reported by the Lords' Committee the words "in any indictment or information for a private libel" are used.

And Lord Campbell, who had charge of the bill in the Lords, in his evidence says (*Cooke's Defamation*, 510) : "It seems to me that the ground upon which it is said that private defamation is criminal is wholly fallacious. The ground generally alleged is, that it leads to a breach

of the peace. I do not think that that is so, either on principle or in practice. On principle I think that defamation is a crime like theft or battery of the person; it is doing an injury to a member of society, who is entitled to the protection of the law, * * In practice prosecutions for libel are uniformly instituted and conducted by the party injured, and merely with a view of vindicating the character of the party injured, or of having revenge upon the libeller, and not in the remotest degree with any view to the protection of the public peace."

Independent, therefore, of the decision in the case of *Regina v. Duffy*, and from what appears on the face of the statute itself, it is evident beyond doubt what the intention of the Legislature was. The provisions of the Act being therefore only applicable to prosecutions for private defamatory libels, is there anything in the statute or in the 11th section that exempts from its operation the trial of an indictment for the publication of such a libel in the event of the trial being conducted by the Attorney General for the Crown, or by counsel representing the Attorney General? I find nothing in the statute to warrant such a limitation, nor do I see any reason for so holding on the ground of public policy. It can hardly be contended that the Attorney General by his fiat can convert a private libel into a public one. Mr. Justice Crompton, in the case above cited, while observing that the Attorney General may and often does institute prosecutions for the defamation of persons of high rank, as the Lord Lieutenant or Lord Chancellor, yet under the statute, in his opinion, these high personages would be entitled to their costs, the case being still that of an indictment by a private prosecutor for defamatory libel, although instituted and prosecuted by the Attorney General.

It was strenuously argued by Mr. Mackenzie that there is no such person as a private prosecutor in this country. If by private prosecutor is meant a person who may by him-

self or counsel conduct a criminal prosecution, irrespective of, or independent of the Crown, then I quite agree with the learned counsel. But that is not what this statute means to signify by the term private prosecutor, and no doubt, as said by Mr. Mackenzie, in this country the practice is, and it is wisely provided, that criminal prosecutions at the Courts of Oyer and Terminer and the Quarter Sessions are conducted by counsel appointed and paid by the Crown, their duty being to assist and advise the private prosecutor in preferring his accusation, and conducting the prosecution at the trial. We are all well aware that there are various indictable offences which are in reality private wrongs or grievances, and the Legislature is annually adding to the number, giving to the party aggrieved redress or a remedy by indictment.

Now, in all such cases it is well understood that what is obviously meant by the expression private prosecutor is the person who puts the criminal law in motion, and if there is a criminal proceeding to which the term private prosecutor is more applicable than another, it is in the case of a defamatory libel—a prosecution, as said by Lord Campbell, uniformly instituted by the party injured.

In *Chitty's Criminal Law*, vol. i., page 1, under the title of "prosecutor," that learned author says, "Criminal prosecutions are carried on in the name of the king, and have, for their principal object, the security and happiness of the people in general, and not mere private redress, but as offences, for the most part, more particularly affect a particular individual, it is not usual for any other person to interfere."

And after referring to crimes where it is obligatory to prosecute, he says, p. 5, "There are also many instances in which the law has rendered it either necessary or advantageous to the party immediately injured to prosecute, as it affects his own private interests, wisely interweaving his own advantage with the public benefit. Thus in some cases a criminal proceeding is the only course he can pursue to obtain redress."

And again, p. 6, "But, though in all cases of offences inferior to felony, the person immediately injured has the option either of proceeding criminally or of bringing an action, there are cases, in which, on the mere ground of interest, the former course will most properly be adopted. Thus the rank or situation of either of the parties may render a criminal prosecution expedient."

And *Blackstone*, in his Commentaries, vol. iv. 303, referring to the proceeding by indictment, remarks: "They (the Grand Jury) then withdraw to sit and receive indictments, which are preferred to them in the name of the Queen, but at the suit of any private prosecutor;" and at page 309, "As the sovereign is bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a Grand Jury inform him upon their oaths, that there was a sufficient ground for instituting a criminal suit."

I have only to add, as shewing what is meant by the term private prosecutor, that these words are used throughout our criminal statutes as indicating the person injured or aggrieved, and provision is made for such parties being bound over to prosecute and prefer indictments.

The words of the condition of a recognizance are (*vide* form O. 1, referred to in 32-33 Vic. ch. 30, sec. 36, D.,) that the party "shall appear at the Court of Oyer and Terminer, * * and there prefer, or cause to be preferred, a Bill of Indictment for the offence, * * and there also duly prosecute such indictment," etc.

The Legislature, in enacting the 11th sec., had some object in view, and granting that there can be no such thing as an indictment by a private prosecutor in the sense argued by Mr. Mackenzie, that would afford, in my judgment, a conclusive answer to the contention on the part of the Crown, for in that case the only one meaning and operation to be given to the section would be that the exercise of the right in question in all cases of indictments for defamatory private libels, was taken away; otherwise the provision has no meaning.

But irrespective of these considerations, I am strongly

inclined to hold that the proper rendering of the clause is, to read the words "any indictment," in conjunction with the words, "for the publication of a defamatory libel." The words "information by a private prosecutor", following the disjunctive "or," being inserted to include that mode of prosecution; and keeping in view the provision in our general Interpretation Act, we are to give to this section a fair, large and liberal construction and interpretation; and, as said by Abbott, C.J., in *Rex v. Hall*, 1 B. & C. 136, the meaning of particular words in Acts of Parliament as well as other instruments is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject matter or occasion on which they are used, and the object that is to be attained.

The indictment in the case before us is clearly one for the publication of a private defamatory libel, but it was pressed by Mr. Mackenzie that notwithstanding it was a private libel, the fact being that he represented the Attorney General, and in that capacity conducted the prosecution, and having so informed the Court, that it became a public prosecution, and not a case within the operation of the 11th section of the statute.

As I have already intimated, by the view I take of the section the right of the Crown in all such cases is in express terms taken away, and it is, therefore, a matter of indifference by whom the prosecution is conducted.

I may here refer to two cases for the purpose of shewing that even where the Attorney General conducts such a prosecution in person, it is not made a public proceeding.

Rex v. Marsden et al., 1 M. & M. 439, which was an indictment against the proprietors of the *Morning Journal* for a libel on the Duke of Wellington, then Prime Minister, vilifying the Duke, one of his Majesty's Ministers, and to cause it to be believed he was guilty of disloyal intentions &c., against the King. Scarlett, Attorney General, and Sugden, Solicitor General, conducted the case on the part of the prosecution, no witness being called for the defence. The Attorney General rose to reply. It was objected on

the part of the defendants that it was a private prosecution, instituted by the Duke as a private individual, and not a public proceeding on behalf of the Crown. This allegation does not appear to have been disputed, but the Attorney General claimed a right of reply, saying he appeared in his official capacity. Lord Tenderden held that the King's counsel, appearing officially, was entitled to reply.

On the same day was tried *Rex v. Bell*, 1 M. & M. 440, the editor of the *Atlas* paper, also a criminal prosecution for a libel on the Lord Chancellor. Scarlett, Attorney General, conducted the prosecution. He did not reply, stating he appeared as the counsel and friend of the Lord Chancellor.

The object of our Legislature, in my opinion, was to put defendants, prosecuted for private libels, on a par with the Crown in respect of challenges, and the empannelling of a jury to try the issues which might be raised under the authority of the statute, issues which in fact are not strictly of a public nature, but only personal to the private prosecutor. If the Legislature intended that when such a prosecution was conducted by the Attorney General in person, or by counsel specially representing him, the case in that event should not come within the operation of the section, it is only reasonable to assume that it would have so expressed itself in distinct terms. But it has not done so. The change in the law which the 11th section has effected, is, I think, a very proper one. We may fairly suppose that Parliament had in view the way in which our criminal prosecutions are conducted, such as by the County Crown Attorney, or by gentlemen requested by the Attorney General from time to time to go to the various circuits; and considering that the right in question, when exercised in cases of defamatory libels, would probably be exercised at the suggestion of the private prosecutor, for the purpose of enabling him to select jurors having, or supposed to have, a favorable leaning. I need not refer to a class of cases where obviously such a state of things might arise. Parliament deemed

it expedient to provide against the exercise of such a right in all such prosecutions.

From any observations I may make, I by no means desire it to be understood that I entertain any opinion that the counsel for the Crown in the case we are considering exercised the right complained of by the defendant from any unworthy motive, or that he acted under any influence other than that which he thought calculated for the ends of justice.

It was further contended by Mr. Mackenzie that the learned Judge could not, and ought not to, without the consent of the Crown, have reserved the point in question for the opinion of the Court, and that it was not competent for the learned Judge to do so, after having at an early stage of the trial overruled the defendant's objection in that respect, and yielded to the contention on the part of the prosecution : In other words, that if a Judge upon a criminal trial rules against a prisoner upon a matter of law—as in the case under judgment, where the Crown is claiming the exercise of a right which is denied by the prisoner—and the Judge adopts at the time the view pressed by the counsel for the Crown, that if the Judge subsequently, and after a conviction, and it being then again submitted and urged by able and respectable counsel that the defendant was by the ruling of the Court placed on his trial at a disadvantage, and pressing that the defendant should have a further opportunity of discussing the correctness of the decision ; and the Judge, either entertaining doubts, or seeing sufficient reason to induce him to reserve a case for the opinion of one of the Superior Courts ; that nevertheless, because he had previously yielded to the argument of the counsel for the Crown, he is prohibited from reserving the point. No authority was cited, and I would have been much surprised if any could have been found for such a proposition.

As I understand the argument of Mr. Mackenzie, he complained that Mr. Justice Burton having once decided against the defendant, that he could not or ought not

afterwards to have reserved the point he had so overruled; for if (as argued) the learned Judge had intimated that he would reserve the question, the Crown might have waived the exercise of the right contended for, and not have, as the learned counsel said, encumbered the trial with a case reserved. I cannot see the force of such a complaint.

In my judgment it is the duty of a Judge, if after the conviction of a person he entertains any doubt as to his ruling on any matter of law which might have prejudiced the accused on his trial, to reserve the point for the decision of the full Court; and in my opinion in the present case the learned Judge acted properly in reserving and submitting the matter as he has done. Nor can I see any ground upon which the Attorney General, through counsel representing him, ought to raise any objection to the course adopted by Mr. Justice Burton; on the other hand, I think it is the becoming duty of counsel prosecuting for the Crown in criminal cases to defer to the opinion of the Judge, and in justice to the accused, and in furtherance of the administration of justice, to aid the Criminal Court in having a doubtful matter fairly submitted for the decision of the Superior Court.

In connection with this subject I may properly refer to some remarks made by Mr. Justice Blackburn in the case of *Regina v. Berens*, 4 F. & F. 842, 853. That learned Judge says the position of prosecuting counsel is not that of an ordinary counsel in a civil case, but that he is acting in a *quasi* judicial capacity, and ought to regard himself as part of the Court; "that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility—not as if trying to obtain a verdict, but to assist the Judge in fairly putting the case before the jury, and nothing more."

And, as said by Mr. Justice Crompton in *Regina v. Puddick*, 4 F. & F. 497, the counsel for the prosecution "are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at *Nisi Prius*."

I see no pretence for saying that the learned Judge ought not to have reserved the case now before us.

Whether the points reserved are matters which this Court can entertain, or, as contended by the learned counsel for the Crown, if raised should have been raised in another form, is quite a different thing, and quite apart from the propriety of the Judge submitting a case. And this brings me to the objection that the question so reserved was not a question of law which arose on the trial, within the meaning of the statute, Consol. Stat. U. C., ch. 112, and that this Court has no jurisdiction to consider it.

Sec. 1 of the statute enacts that when a person has been convicted of felony or misdemeanour before any Court of Oyer and Terminer, the Judge before whom the case was tried, may, in his discretion, "reserve any question of law which arose on the trial, for the consideration of either of Her Majesty's Superior Courts of Common Law, and thereupon may respite execution of the judgment," &c.

And by sec. 2 the Judge shall thereupon state in a case the question or questions of law, with the special circumstances upon which the same arose, &c.

And by the 3rd section the Superior Court "shall hear and finally determine the said questions, and reverse, affirm, or amend any judgment given on the indictment, or shall avoid such judgment, or order an entry to be made on the record that in the judgment of the said Justices the party convicted ought not to have been convicted, or shall arrest the judgment, * * or shall make such order as justice may require."

And the 80th sec. of 32-33 Vic., ch. 29, after abolishing appeals and new trials in criminal cases, enacts that "no writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the Judge * * * refused to reserve for the consideration of the Court, * * but nothing in this section shall be construed to prevent the subsequent trial of the offender for the same offence, in any case where the conviction is declared bad for any cause which makes the former trial a nullity, so that there was no lawful trial in the case."

Our Consolidated Statute is similar to the provisions in the Imperial Statute for reserving cases for the Court of Criminal Appeal.

In the case of *Regina v. Manning*, 4 Cox C. C. 31, an application was made on behalf of the prisoner that she should be tried by a jury *de medietate lingue*. It was objected to by the Attorney General, and ruled by the Court, that the application could not be made until she pleaded. On the prisoner doing so the application was renewed, and after discussion (*vide* report of the trial, 1 Den. C. C. 467), the Court ruled that the trial must proceed with the ordinary jury. The defendant's counsel then moved that the application might be entered on record. The Attorney General said he would in such case enter a plea that the prisoner had married a natural born subject. The point was also reserved for the consideration of the Criminal Court of Appeal, and the point so reserved was argued by eminent counsel on both sides. No objection was raised or suggested that it was not a case within the statute. Now the point there reserved and raised, was one in principle similar to the one before us. It was also raised at the same time, at the trial after plea, and concerning the composition of the jury. And the point was decided against the prisoner, and the trial proceeded, the point being, as I have said, reserved as a question of law arising during the trial and argued as such without objection.

In *Regina v. Martin*, 2. C. & K. 956, Rolfe B., said that the word "trial," in the statute, "ought to have a very liberal construction, and I think it applies to any proceeding in the Court below."

And in *Regina v. Faderman et al.*, 1 Den. C. C. 565, the question as to when the trial commenced was discussed. It was argued that it commenced as soon as the prisoner was called on to plead.

Parke, B., said, p. 567, that "Properly, there is no trial until issue is joined."

I have no doubt, upon the authority of the cases

referred to, as well as the reason of the thing, that the question raised here is one of law, and that it arose during the trial, and so could be reserved by the learned Judge.

On the whole, as to the first question submitted, I am of opinion that the true construction and meaning of the 11th section of the 37 Vic., ch. 38, D., is, that in all cases of indictment for defamatory libels within the statute the right of the Crown which previously existed to cause jurors to stand aside is taken away, and that the learned Judge ought not to have held that the counsel for the prosecution was entitled to exercise the right in question, and to direct the jurors who were called to stand aside, as stated in the case reserved.

As to the second point submitted by the case, and the question put by the learned Judge, whether the publication of a libel upon a person temporarily absent from the Province is indictable, the case shews that although the usual residence of the party libelled was in England, he had come to this country with emigrants, had left for a temporary purpose, and had gone to England *animo revertendi*. I see no ground for holding that under such circumstances an indictment could not be sustained. The ruling of the learned Judge in that respect was correct.

Then as to the last point submitted: As I understand the question reserved it is this:—The libel, *i. e.*, the article set out in the indictment, contained several distinct charges, reflecting on the prosecutor's character, all of which were justified by a general plea, asserting the truth of all the alleged libellous matter set out in the indictment. The learned Judge directed the jury that they were to consider whether each of the several charges were libellous; if they found that all or any of them were libellous, then was the truth of the material allegations of all the charges found by them to be libellous made out to their satisfaction; and that if the truth of any of the charges they found libellous was not proved they should find a verdict for the Crown:—in effect, shortly this—if the jury found that in the article complained of

there were one or more distinct charges or imputations in their opinion libellous, and that the defendant failed to prove the truth of any of such one or more libellous charges, they were to find the defendant guilty. If such was the direction of the learned Judge, and I take it to be so from the case reserved, I am of opinion there was no misdirection, such a charge being in accordance with the decision in the case of *Regina v. Newman*, 1 E. & B. 558.

Our judgment on the first point reserved being in favour of the defendant, the verdict cannot stand. We therefore avoid the judgment given on the indictment, and declare that the defendant ought not to have been convicted.

WILSON, J.—The question whether the Crown is prosecuting on behalf of the public or not appears to be more a question of fact than of law. If, however, the statute is to be construed as meaning that all prosecutions are of a private nature unless those which are plainly of a blasphemous or seditious nature, or which are of that special character affecting the policy of the State in its dealings with foreign potentates or countries, or which affect the public peace or welfare—then it must be a matter of law which the learned Judge had it in his power to reserve. The mere fact that the Crown prosecutes in the ordinary course and routine of business as pursued in this country, by a counsel it appoints for the purpose, will not necessarily make it a proceeding not carried on by or for a private prosecutor, within the proper meaning of the statute to be given to it—otherwise every criminal prosecution in this country would be a Crown prosecution, and the enactment be of no kind of use.

32 & 33 Vic., ch. 29, sec. 28, D, provides that “No bill of indictment for * * perjury, * * shall be presented or found by any grand jury, unless the *prosecutor or other person presenting such indictment* has been bound by recognizance to prosecute or give evidence against the person accused * * * or unless the indictment for such offence is preferred by the direction of the

Attorney General or Solicitor General for the Province, or of a Judge of a Court having jurisdiction to give such direction, or to try the offence," &c.. See also sec. 29.

Here it is assumed that a prosecution, although it must be in the name of the Crown, and a proceeding, although it be initiated by a Queen's counsel, shall not be allowable, unless with the special direction of the Attorney or Solicitor General, or of a Judge. And it is also expressly recognized that there is and may be such a person in these cases as the *prosecutor*, or *person presenting the indictment*, who is to be bound by recognizance to prosecute or give evidence. That person must, of course, be a private prosecutor.

The prosecutor may be settled with by the party convicted of assault, by 32 & 33 Vic., ch. 20, sec. 78, and if a trial be postponed the *prosecutor* shall be bound over to prosecute: ch. 29, sec. 30. These expressions cannot in any way apply to the Crown as the prosecutor.

Criminal prosecutions are chiefly carried on by a private prosecutor. The person who has been assaulted or robbed, or had his house burned, or has been defrauded, or has had his crops, trees, or mill-dam injured, is naturally the complainant, and is entitled to use the name of the Crown. If he did not prosecute, he would have no occasion to be bound to prosecute.

And the reason why the person injured is usually the prosecutor, is, that he naturally desires to have punished the person who has wronged him; and because he cannot, in most cases, prosecute civilly for his own private redress until he has prosecuted criminally for the public wrong.

Lord Campbell, in his evidence before a Committee of the House of Commons on the subject of appointing public prosecutors, said: "As the law and practice now exist, he (the Attorney General) is merely a private advocate, and his services may be professionally required by any person who is accused:" 2 Jur. N. S., part ii., p. 34.

And in the *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1, at p. 18, it appears Wickens represented the Attorney General, who was a defendant, while the Attorney General

himself appeared for the other defendants in his private capacity.

I concur in the opinion expressed by my brother Morrison, and upon the authorities to which he has referred, that the provisions of the statute in question do apply to all defamatory publications upon private persons, however high in rank or office, but that the provisions do not extend to those graver offences of seditious or blasphemous libels or others of the like serious nature; and it is of no consequence by whom the prosecution may be carried on, whether by the Crown officers or otherwise, they are equally prosecutions enforced for the benefit only of the person libelled, and who is in truth the private prosecutor as distinguished from the nominal public prosecutor.

It was contended by Mr. Mackenzie, that he represented the Government or the Attorney General. No doubt he did, but that will not prevent the prosecution, within the meaning of the Act, being one which is carried on by and for a private prosecutor.

And it was further contended by him that the learned Judge had exceeded his powers, and was acting in a manner almost subversive of justice, in asking the opinion of the Court before enforcing the penalty against the defendant upon a point on which the learned Judge entertained a doubt of the law.

If the learned Judge had been so confident of his opinion as the learned Queen's counsel was of his, he would not have reserved the case, but the learned Judge would nevertheless have been wrong in his law. And if he had enforced the penalty, he would have done wrong to a man who was illegally tried.

The learned Judge, feeling the responsibilities of his office, and feeling himself above that which was too freely expressed, did what a conscientious Judge is bound to do—consider well what his course should be before he pronounced and enforced his sentence. There is no matter with which any other than the Judge has less to do, than when he desires to take advice or to deliberate before he

acts. It is his sole concern. It is a matter of conscience and duty with him and with himself alone; and how so much opposition could have been made in the case, and that too on behalf of the Crown—the source of mercy, as well as of justice—surprises me not a little.

The Crown can never desire to convict or to punish anyone but on the clearest evidence. The Crown prosecution is in the nature of an inquisition to enquire into and determine what the facts are. It is not a vindictive proceeding, nor a compensatory action, to punish or to recover damages. The proceedings by the Crown are always conducted temperately, and I may say favourably for the person accused, and it is for the public interest it should be so.

A private prosecution, no matter by what officer it is conducted, cannot or is not likely to be so managed. There is usually a desire to convict, and the animosity of the litigant is imported into what he wrongly calls a public prosecution. It was a wise provision to restrain the right of the Crown—not the prosecutor's rights, but the right of the Crown, be it observed—from being invoked in aid of any such case, and as that right has been wrongly exercised to the prejudice of the defendant there has been a mis-trial.

I shall quote the language of one of the Judges of the Irish Court as especially applicable to this case.

In *Regina v. McCartie*, 11 Ir. C. L. Rep. 188, on a question whether the Attorney General for the Crown had the right to postpone the trial without an affidavit of facts, O'Brien, J., said, p. 206: "It has, however, been argued that the course of proceeding in those several cases in England may be accounted for by the circumstance that the prosecutions, though carried on in the name of the Crown, were not actually conducted by the Crown, represented either by the Attorney General, (as in this case) or by counsel appointed by him (as in most of the prosecutions in Ireland), but were conducted by private prosecutors and their counsel, who would not be entitled to the same privilege as the Attorney General or counsel appointed by him. But in

my opinion, this distinction does not affect the questions now before us. In *Regina v. McGowan*, (not reported), decided last year by the Court of Criminal Appeal in Ireland, my brother Christian, before whom the case had been tried at the Sligo Assizes, reserved the question whether the right of ordering jurors to stand by in cases of misdemeanour, which unquestionably belongs to the Crown when prosecuting by the Attorney General or counsel appointed by him, may also be exercised by a private prosecutor or his counsel, and it was held by all the Judges of the Court of Criminal Appeal (with one exception) that because the right existed in the former case, it also existed in the latter. I do not see why, upon a similar principle, a private prosecutor or his counsel should not have the same privilege with respect to the postponement of a trial, as would belong to the Attorney General or his counsel in prosecutions actually conducted by them for the Crown; and it would therefore follow that the English cases, which negative the existence of such a right in private prosecutors, or their counsel, are authorities to shew that it does not exist in prosecutions conducted by the Attorney General or his counsel."

As to the second question, I agree that from the facts appearing—that the prosecutor had been in this country and was employed by the Government of this Province in England, and had the intention of returning here—that the publication complained of may properly be said to have had a tendency to produce a breach of the peace in this country in his case.

As to the third question, I think the learned Judge rightly directed the jury. The justification should be an answer to the whole libel: *Ingram v. Lawson*, 5 Bing. N. C. 66; *Regina v. Newman*, 1 E. & B. 558; and it should cover even the circumstances of aggravation: *Helsham v. Blackwood*, 11 C. B. 111.

In answering the questions, we must for the first cause reverse or avoid the judgment given on the indictment, and declare that in our judgment the defendant

ought not to have been convicted. That, it appears, is all we have to do upon this case under the statute. The rule will be accordingly drawn up.

RICHARDS, C. J.—After the best consideration I can give the subject, and looking at the history of the statute under discussion both in England and in this country, I think it was intended that the right to justify and give the truth in evidence on an indictment or information for libel should be limited to *defamatory* libels on *individuals*. It was, I think, intended not to permit a prosecutor to obtain an advantage over his adversary by complaining of a defamatory libel in the form of an indictment or information thus instituted in the name of the Crown.

While, on the one hand, he was not driven to bring a civil action to vindicate his character, on the other, if he sought to vindicate it by a prosecution, he was not to have the right to prevent the defendant shewing that what had been published was true, and that it was for the public benefit that the matter complained of should be published.

The statute does not seem to contemplate, nor does the practice for many years past in England shew, that the Attorney General on behalf of the Crown is to institute proceedings for a purely defamatory libel on a private individual. It is true that in practice in this country the Attorney General selects counsel, who are paid by the Crown to conduct prosecutions at the Assizes, but I apprehend that many of these prosecutions are substantially instituted by private prosecutors, who are bound over to prosecute, and who are often sued for malicious prosecution when they fail to make out a case before a jury.

The Imp. Stat., 6 & 7 Vic., ch. 96, sec. 6, as amended by the Imp. Stat., 25, D.; and as secs. 5, 6, 7, 8, and 9 of the Act of 1853, D.; and the opinions expressed by the judges in the case of *Regina v. Duffy*, 2 Cox C. C. 45, shew that that clause of the statute was not intended to apply to any but defamatory libels, and reference was made to the provision in the 7th

section for the payment of costs by the defendant in case the issue on the special plea of justification was found for the prosecutor, as shewing that it could only apply to proceedings by private prosecutors, for as it was said the Crown never receives costs.

Blackburne, C. J., said, in giving judgment in that case, p. 49, "By the 6th section the power of pleading a justification is extended to cases of private prosecution, by way of indictment or information. The benefit which was withheld from defendants in criminal prosecutions for libel, of pleading a justification, has been extended to those cases by this statute," (6 & 7 Vic., ch. 96, sec. 6.)

Crampton, J., said, p. 49, "The justification allowed by this statute to be put in is just such a one as would be a justification in a civil action for libel, before the statute, shewing that it was personal libels which were intended by the Legislature to be affected by the Act. But it is said, why use the words '*private prosecution*' in the 8th section, unless to distinguish such from public prosecutors, and unless public prosecutions also were referred to. Now I apprehend that a very sensible reason may be assigned for the use of these words."

He then quoted section 8 of the Imp. Stat., as to the costs to be recovered when the issue is found for or against the defendant, and proceeded, p. 50:—"Now, why say this if it was intended to refer to Crown prosecutions?" for the Crown neither takes nor gives costs. But the Attorney General may, and often does, institute a prosecution for the defamation of an individual of high rank or authority, as the Lord-Lieutenant, suppose, or the Lord Chancellor; and if in such case the issue be found for the prosecutor he shall be entitled to his costs, or the defendant shall be entitled to his, if the issue be found for him; that appears to be the reason why these words are used."

The views of the Judges in that case seem to be in accord with what may be said to be the intention of the framers of the Act, judged by tracing its history, its introduction into the House of Lords by Lord Campbell, and its passage through the Legislature.

If it was the object of the statute, when proceedings were instituted for the publication of a defamatory libel, to place the parties on terms of equality before the law, such publication being the truth, and made for the public interest, then not allowing jurors to be directed to stand aside at the instance of the party prosecuting would not seem to be an unreasonable proposition. The parties are looked upon as ordinary litigants, so far as to be allowed to recover and compelled to pay costs, when they succeed or are defeated on the issues raised on the trial of the indictment.

If the defendant is allowed to justify, under the 6th section of the Imp. Stat. (and under the same section of our Act), then the opinions expressed by the Judges in *Regina v. Duffy* indicate that under the 8th section of the Imp. Stat., similar to the 12th section of our Act, the parties succeeding on the pleas of justification are entitled to costs; yet the language used in the introductory part of the section is "in the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment shall be given" for, &c., the successful party is entitled to his costs.

The 11th section of our statute, referring to the right of the Crown to cause a juror to stand aside, declares that it shall not be exercised on the trial of "any indictment or information by a private prosecutor for the publication of a defamatory libel."

The words referring to the indictment and prosecutor being identical in the two sections, they ought to have the same application. The reasonable conclusion then is, if the successful party is entitled to costs against the defendant under the 8th sec. of the Imp. Stat., when the plea of justification is tried under the 6th sec., and found for him, then the defendant has the right to insist that the Crown shall not exercise the right of causing a juror to stand aside on such trial.

The language of Mr. Justice Crampton, already quoted, shews that the prosecutor, if successful, would be entitled to costs under the 8th section of the Imperial Act.

Looking at the facts of the case as they are presented to us, I think the weight of reason and authority is that this prosecution is one in which the Legislature contemplated that a justification might be pleaded; and if the prosecution was successful as to that plea, that costs should be awarded against the defendant. If costs would be awarded to the prosecutor, under the 12th section, then it seems to me to follow as a corollary that the defendant had a right to insist under the 11th section that the Crown should not exercise the right of directing the jurors to stand aside on the trial.

I concur in the conclusion arrived at by my brother Morrison in his elaborate judgment; and think that the right of the Crown to order jurors to stand aside at the trial was not properly exercised in this case; and I am of the opinion that this difficult question, which the learned Judge properly reserved for our judgment, should be decided in favour of the defendant.

I concur with my learned brothers in thinking that the ruling of the learned Judge at the trial on the other points was correct.

Judgment for defendant.

IN RE SLAVIN AND THE CORPORATION OF THE VILLAGE OF ORILLIA.

Sale of liquor—Prohibitory by-laws—Powers of Municipal Corporations—Authority of the Provincial Legislature—32 Vic., ch. 32, O.

By-laws passed by Municipal Corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine: *Held*, valid, as being within the power of the Corporation, under 32 Vic., ch. 32, O.; and that it was within the authority of the Provincial Legislature to confer such power, under the exclusive legislative authority given to them with regard to "Municipal Institutions," and to "matters of a merely local or private nature" in the province; and was not an interference with "the Regulation of Trade and Commerce," assigned exclusively to the Dominion Legislature.

A by-law, passed on the 21st July, 1874, appointed an officer, under 36 Vic., ch. 34, sec. 8, O., to enforce the provisions of said Act, and the Acts therein recited, and the by-laws of the Corporation respecting shop and tavern licenses. This by-law was passed to fill a vacancy in the office, caused by the resignation of the person appointed under a by-law passed in February previous. The 36 Vic., ch. 34, had been repealed when the by-law was passed by the 37 Vic., ch. 32, which gave power to fill a vacancy in such office. *Held*, that the by-law was not invalid, because not passed in February, under sec. 9 of the last mentioned Act, nor for not defining the duties, &c., of the officer appointed, which might be done by another by-law.

Held also, upon the facts stated in the case, that it was not invalid as not having been passed at a legal meeting of the Council, or signed by the Reeve.

In Trinity Term, August 28, 1874, *M. C. Cameron*, Q.C., obtained a rule *nisi* to quash By-laws 53, 54, and 56, of the Village of Orillia; as to No. 56, or so much of it as authorized William Stark to enforce the performance of the Act 36 Vic., ch. 34, O., and the Acts mentioned in the recital thereof, on the grounds:—

That it was not within the power of the said corporation to pass the said by-law in the month of July.

That it appointed an officer to enforce the provisions of an Act not in force, but repealed.

That it did not, as required by law, define the duties, powers or privileges of William Stark, the officer therein named, or fix his remuneration.

That it could only have been passed in the month of January or February.

That it was passed on the 21st of July, 1874, and was not passed at a legal or proper meeting of the Council, and was not properly signed by the Reeve, as shewn by affidavits and papers filed.

As to No. 54, passed 20th March, 1874, for prohibiting the sale of liquors in shops and places other than houses of public entertainment, at the village of Orillia, on the grounds :

That it was beyond the powers of the corporation to pass it, as it totally prohibited the granting of shop licenses in the said village, whereas the corporation has only the power to limit the number, and not to prohibit.

That no municipal corporation had power to prohibit the granting of shop licenses, or even to limit the number.

That the Legislature of Ontario has no power to authorize a municipal corporation to limit the number of shop licenses, but only to authorize the imposition of licenses for the purposes of revenue.

As to No. 53, for limiting the number of tavern licenses to be issued within the limits of the said village, &c., on the ground :

That the corporation had no authority to limit the number of tavern licenses ; that the Legislature of Ontario has only power to deal with licenses for the purposes of provincial, or local, or municipal revenue, and cannot authorize a municipal corporation to limit the number of licenses to be issued, and the said by-law is beyond the jurisdiction and power of the corporation to pass.

No. 53 was passed on the 17th February, 1874, No. 54 on the 20th March, 1874, and No. 56 on 21st July, 1874.

The enacting part of By-law 56 was :—

“ That William Stark be appointed the officer, under the 8th section of the 36 Vic., ch. 34, to enforce the provisions of the said Act and the Acts mentioned in the recital thereof, and the by-laws of the Corporation respecting shop and tavern licenses, and that the said William Stark shall also be and is hereby appointed Village Inspector, Caretaker of Public Property, and Messenger of the Council,

and to perform such other duties as may be defined by the Council.

(Signed) LAURENCE HAYDEN, [Corporate Seal.]

Chairman of the meeting of the Council at which above By-law was passed, on the 21st July, A.D. 1874.

(Signed) FREDK. JNO. ROBT. GRANT,
Clerk to the Corporation."

Of No. 54, the enacting part was as follows :—

"That from and after the passing of this By-law no shop license shall be granted within the village of Orillia, and that the sale of fermented, vinous, or spirituous liquors in shops and places other than houses of public entertainment, shall be wholly prohibited.

"That the votes of the electors shall be taken on the said proposed By-law at the following places, that is to say: at Temperance Hall, in the Village of Orillia, on Friday, the twenty-seventh day of February, A.D. 1874, commencing at the hour of nine o'clock a.m., and closing at five p.m. of the same day, and that Frederick John Robert Grant, Clerk of the said Municipality, shall be Returning Officer for taking the said votes.

(Signed) FREDK. JNO. ROBT. GRANT,
Clerk to the Corporation. [L.S.]

Passed 20th March, 1874."

Of No. 53, the enacting part was as follows :—

"That no more than nine tavern licenses shall be issued within the limits of this corporation; that no person convicted during the year last past of a violation of the License Law shall be allowed to hold a tavern license during the current year.

"That in lieu of the sum fixed by By-laws forty-four and forty-six of this Municipality, the sum to be paid for each tavern license shall be one hundred dollars, over and above the Government duty, and a fee of one dollar to the Clerk of the Municipality for issuing the necessary certificate for obtaining the same.

(Signed) WESLEY BINGHAM,
Chairman.
[Corporate Seal.]

(Signed) FREDK. JNO. ROBT. GRANT,
Clerk to the Corporation.

17th February, 1874"

Upon the application an affidavit of Mr. *Slavin* was filed, to the effect, that the meeting at which by-law 56 was passed, was called without any requisition in writing: that it was not an ordinary meeting, but was called for the special purpose of passing by-law 56: that two councillors called on the clerk of the corporation at 9 or 10 o'clock in the evening of the day before the meeting, and requested him to call a meeting for the next morning, at 10 a.m.: that no request in writing was left with the said clerk: that on the next morning the council met, but the Reeve was not present: that the by-law was passed, and ordered to stand over for the signature of the Reeve; that at the next meeting at which the Reeve was present, he was asked to sign said by-law, but he refused, not being satisfied as to the manner in which the same had been passed; and that after such refusal the chairman of the meeting, at which the said by-law had been passed, signed the said by-law.

An affidavit of the clerk, Mr. *Grant*, was also filed, stating that by-law 56 was passed to appoint a person to fill a vacancy in the office therein mentioned; that by certain proceedings at law the present Reeve was declared seated on the 18th July, 1874; that the meeting was called on the 20th, (as set out in the affidavit of *Slavin*); that at the time of the meeting the Reeve had not signed the declarations of qualification and of office, but he did so on the same day, after the meeting of the Council: that at such meeting the by-law was passed and ordered to be signed by the Reeve and Clerk and sealed: at the next monthly meeting, on the 3rd August, the Reeve was requested to sign the by-law, and on his refusal—at a subsequent meeting on the 6th August—it was moved, seconded, and carried, that the by-law should be signed by the chairman of the meeting at which it was passed, which was done.

In Michaelmas Term, Dec. 3, 1874, *Kenneth Mackenzie*, Q.C., for the Government of Ontario, as to the power of the Local Government to authorize the Municipality to pass

By-laws Nos. 53 and 54, referred to the argument in the case of *Regina v. Taylor*, which was argued on the same day (a.) If the Local Government do not wish a revenue from shop or tavern licenses, they may forbid their issue altogether: S. 92 of British North America Act, sub-sec. 9.

F. Osler, for defendants, shewed cause. As to By-law No. 56. The by-law passed in 1873 would be in force until February, 1875. 36 Vic., ch. 34, sec. 8, O., does not require the appointment of the officer to be by by-law. It was within the general power of the Council to pass this by-law though the statute of 1873 was repealed. If that is of any consequence, the applicant should shew affirmatively that there was no salary or remuneration affixed to the office. The general powers under the Municipal Institutions Act of 1873, secs. 222, 223, authorize the passing of the by-law. The affidavits shew that the officer had resigned, and the new appointment was made to fill a vacancy. Sec. 9 of the Act of 1874, 37 Vic., ch. 32, refers to the passing of by-laws in February of each year, which shall not be repealed during the year, from the first day of March following, which are among other things, "8. For appointing annually one or more fit and proper persons * * to be * * Inspectors of Licenses, and *or* (*sic.*) filling any vacancy in such office;" and "9. For fixing and defining the duties, powers, * * of the Inspector * * so appointed, the remuneration he * * shall receive, and the security to be given for the efficient discharge of the duties of the office of Inspector." Though the statute of 1873 was repealed, these were acts to be done under it. The affidavit now filed shews that when the by-law was passed the present Reeve had not taken the oath of office. Secs. 178, 179, of the Municipal Act of 1873, shew who is to preside at the meetings of the Council and how meetings are to be called. The by-law was passed when four members of the Council were present, when the Reeve had not taken the oath of office, and was afterwards so far affirmed that at the meeting of

(a) Reported post 183.

the Council on the 6th August, they directed Mr. Hayden, the Chairman of the Council when the by-law 56 was passed, to sign it as such chairman. Sec. 212 of the Municipal Act of 1873 shews that the Reeve should take the oath of office before entering on the duties of his office. On the 20th February, two members of the corporation in person called a meeting of the Council for the following morning, to take into consideration the report of the committee appointed to procure the services of an Inspector of Licenses to fill the vacancy. *Hunt v. Hibbs*, 5 H. & N. 123; *Regina v. Mayor and Assessors of Rochester*, 7 E. & B. 910; *Grant on Corporations*, 154, 156; *Preston and the Corporation of the township of Manvers*, 21 U. C. R. 626, may be referred to to shew that as to the appointing of the officer to fill the vacancy the proceedings were proper, and that many provisions in statutes as explicit as those referred to are considered as directory and not mandatory, and that the by-law was signed by the proper officer, the Reeve having declined to sign it. The affidavit shews the by-law 54 was passed on 20th March, 1874, by the votes of the electors. It is not objected that the by-law was not approved by the electors. If the Ontario Act was not in force when the by-law was passed, the Act of 1866 is in force. See also *Harrison's Municipal Manual*, 163.

M. C. Cameron, Q.C., contra. The Statute of 1873, sec. 8, was repealed before the passing of the by-law. The repealing Act of 1874, 37 Vic., ch. 32, sec. 6, makes other provisions, and varies that relating to the appointment of Inspectors, making the appointment annual. Besides, all the requirements are not complied with in the by-law. The sections of the Municipal Act applicable to the meetings of the Council, and acting by by-laws, which may be referred to, are the 171st, 178th, 179th, 180th, 222nd, and the 223rd. The limiting the number of shop licenses is a restraint of trade, which is a matter solely under the control of the Dominion Parliament. The British North America Act does not give the Local Legislature the power

to delegate to Municipal Councils the right of deciding as to the number of licenses, or to refuse granting licenses. The prohibiting the sale of intoxicating liquors in stores is as bad as prohibiting it entirely. *Regina v. Wood*, 5 E. & B. 49, 54, shews that the right of the Legislature to confer this power to pass the by-law ought to be considered, and when power is given to a subordinate body it will not be extended by construction. The power conferred on the Local Legislature was solely for the purpose of revenue. *Elwood v. Bullock*, 6 Q. B. 383, shews that municipalities cannot pass by-laws nominally for purposes of police, but really in restraint of trade; and that these by-laws for either purpose must be reasonable.

March 2, 1875, RICHARDS, C. J., delivered the judgment of the Court.

At the time of the passing of the British North America Act of 1867, the Municipal Institutions Act of Upper Canada then in force was 29-30 Vic., ch. 51, passed in August, 1866.

By the 249th section of that Act "the Council of every township, town, and incorporated village, and the Commissioners of Police in cities," might respectively pass by-laws, amongst other things :

4. "For limiting the number of tavern and shop licenses respectively; but in no municipality shall tavern license certificates be granted in a proportion greater than one for every two hundred and fifty souls resident therein," and

9. "For prohibiting the sale by retail of spirituous, fermented or other manufactured liquors in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, has been duly approved by the electors of the municipality in the manner provided by this Act."

At the same time there was a statute, 27-28 Vic., ch. 3, in force compelling brewers and distillers to take out licenses to manufacture spirits and beer, and imposing a duty of excise on the articles manufactured by them; and

these articles were also subject to a duty on being imported into Canada, by 29-30 Vic. ch. 6, on spirits and strong waters to the extent of 70 cents a gallon for proof.

The manner in which the revenue for the sale of ardent spirits by retail and in taverns was raised was by enacting that any person who should sell ardent spirits without a license should suffer a penalty; then the mode of obtaining the license was defined, and the amount payable therefor was to be fixed, as far as the municipality was concerned, by the municipal authority.

At the time of the passing of the British North America Act, there prevailed in this country a well established mode of licensing shops and taverns.

Shop licenses were declared in the Municipal Act of 1866, 29-30 Vic., ch. 51, sec. 249, sub-sec. 1, to be "licenses for the *retail* of such liquors in quantities not less than *one quart*, in shops, stores, or places other than inns * * or places of public entertainment."

And under section 252 of the same Municipal Act it was provided that: "No tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received, from the importer or manufacturer; provided such packages contain respectively not less than five gallons or one dozen bottles."

The statute under which the two by-laws, No. 53 and 54, were passed was 32 Vic., ch. 32, O. Sec. 40 of that Act repealed the sections from section 249 to 263, inclusive, of the Municipal Act of Upper Canada, 29-30 Vic., ch. 51, in relation to the granting of licenses, and introduced similar provisions into the statute which was then passed.

Sec. 6 of 32 Vic., ch. 32, enacted that: "The Council of every township, town, and incorporated village, and the Commissioners of Police in cities, may respectively pass by-laws": * *

Sub-sec. 4. "For limiting the number of tavern and shop licenses respectively." * *

Sub-sec. 7. "For prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any

tavern, inn, or other house or place of public entertainment; and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment; provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the Acts 29-30 Vic., ch. 51."

Sub-sec. 8. "For appointing annually one or more fit and proper persons * * to be inspector or inspectors of licenses."

Sub-sec. 9. "For fixing and defining the duties, powers, and privileges of the inspector or inspectors so appointed; the remuneration he or they shall receive; and the security to be given for the efficient discharge of the duties of the office of inspector."

It is said that the Local Legislature of the Province of Ontario had no authority to pass the last statute of 32 Vic., ch. 32, or at all events the portions of the statute which authorized the municipality to pass by-laws to limit the number of tavern licenses to be granted, and to prohibit the granting of shop licenses.

If the Legislature of Ontario had no power to make these provisions in their statute, had they power to repeal those provisions in the Act of the Parliament of Canada? And if they had no power to repeal these sections they must now be in force, the 129th section of the British North America Act, directing that "all laws in force in Canada * * at the union * * shall continue * * as if the union had not been made; subject * * to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament or of that Legislature or under this Act."

Under the head of "Distribution of Legislative Powers." "Powers of the Parliament," by section 91 of the British North America Act, it is provided that, "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, *in relation to all matters*

not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, (notwithstanding anything in this Act,) the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereafter enumerated ; that is to say " (amongst other things):

2. "The regulation of trade and commerce."

3. "The raising of money by any mode or system of taxation."

And under the head—"Exclusive Powers of Provincial Legislatures :"

Section 92. "In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereafter enumerated, that is to say," (amongst others) :

"8. Municipal institutions in the province."

"9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes."

"13. Property and civil rights in the province."

"15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

"16. Generally all matters of a merely local or private nature in the province."

It is contended that the limiting the number of licenses to be granted to taverns in a municipality, or preventing the issuing of shop licenses, is interfering with the exclusive right of the Legislature to pass laws for the regulation of commerce, and that the statute of the Ontario Legislature, authorizing this to be done, is *ultra vires*.

On the other hand, it is urged that the regulating of taverns, the limiting the number of licenses, and the dealing with the subject of the keeping and retailing of certain

classes of articles must be in the nature of police matters, properly pertaining to the powers of municipalities, and must be "matters of a merely local and private nature in the province."

In January Term, 1847, in the Supreme Court of the United States, judgments were pronounced in what are there styled the *License Cases*—reported in 5 How. 504. The cases were argued by some of the most distinguished lawyers in the United States, including the late Daniel Webster.

The doctrine contended for by the parties who opposed the laws, was, that though they authorized the commerce in wines and spirits in quantities not less than 28 gallons, they were repugnant to the constitution and laws of the United States: 1st. In the power to regulate foreign commerce. 2nd. In the power to collect revenue on imports into the several States. 3rd. In the equal apportionment of taxes and duties in all the States. 4th. In the power to make treaties.

The general course of the argument was, that no State had the right to prohibit the sale of merchandise by wholesale or retail, authorized by a valid law of Congress, or by treaties, to be imported into its markets, the retail sale being as indispensable to the object of importation,—viz., use and consumption—as the wholesale. If a State can control, to the extent of prohibition, commerce in imported merchandise up to her boundaries or the instant it shall pass in bulk from the hands of the importer, she can thereby exclude foreign commerce, and deny her markets to foreign nations. The laws of Congress make no distinction between commerce in imported wines and spirits and other foreign merchandise. The recognition of the power of a State to exclude the first from its markets whenever public sentiment requires it, must embrace the like power in respect to all other descriptions of imports whenever the public sentiment of a State demands its exercise. The point where regulation ceases and prohibition begins, is the point of collision and of unconstitutional operation of a State law affecting foreign commerce. In any and all

cases the power to deny sale includes the power to prohibit importation; and the question of power is the same, whether exercised directly by the Legislature, or indirectly by its agents thereunto authorized. The operation of the law on foreign wines and spirits deprives imported articles of their vendible quality. The right to sell is connected with the payment of duties, and the right to sell must extend beyond the importer or it is an inoperative right. By treaty with France their wines are admitted to consumption in the markets of the United States. The law complained of shuts the markets of the State against the fair and just operation of those laws and treaties of the United States, and renders them so far inoperative.

The Act blends two powers to be exercised at pleasure under the statute—the one legitimate, to regulate; the other unconstitutional, to prohibit whenever the public sentiment of the State comes up to that point. If one State can exclude one or more articles of import, she pays so much less revenue than other States that admit all, and in this way the “duties are not uniform throughout the United States.” If a State shuts its markets against one or more articles admitted under a reciprocal treaty with a foreign nation by denying a sale of it, then the United States cannot, in good faith, perform its reciprocal engagements.

The line of argument in favour of the constitutionality of the law was after this sort:—The State has a right to provide for the health of its citizens by police regulations. A law restraining an indiscriminate traffic in wines and spirits, designed to protect life and health by promoting temperance and sobriety, is a police law. In *Brown v. Maryland*, 12 Wheat. 443, the Court observes, “That the power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the States,” and the removal or destruction of infectious or unsound articles is undoubtedly a branch of the same power. Harbour laws, ballast laws, &c., are of a similar character. They are sustained because

they are police regulations of the States, and are not regulations of foreign commerce, though for the purpose of protecting health and property they necessarily deal with it, and such laws are not incompatible with or repugnant to foreign commerce. Police laws have in fact everywhere been maintained against the supreme power of the United States, notwithstanding this obvious interference. The design of the law is manifestly to prevent tippling and disorder, by promoting temperance and sobriety, and whether it be a regulation of trade or police, or both, relates to affairs completely internal. Is this a suitable matter to engage Legislative attention? Does such a traffic demand restraint, or does the Legislature employ it as a pretext to regulate foreign commerce? Whether an applicant for a license is a suitable person, and whether the public good requires the grant to be made, are facts to be ascertained which must depend upon evidence, and the question cannot be decided without an exercise of judgment. It is difficult to comprehend how a selection of suitable persons or of suitable places can be made without the exercise of so much discretion as such a decision implies. Police laws may be carried to any extent which the public welfare demands. If the cargo of a vessel is infected and dangerous, it is destroyed, and all revenue and private interests are sacrificed for the public safety. Gunpowder is required to be landed and stored in a way which saves life and property from jeopardy. Ballast is required to be deposited where it does no mischief to navigation. The publication by sale or otherwise of obscene books, prints, pictures, &c., is an indictable offence. Yet such laws are undeniably constitutional, and are maintained as police regulations on the ground that the public health, morals, and property, demand protection. The legal provision in that behalf must be such as to meet the emergency. If excessive indulgence in intoxicating drinks be an evil, it should be guarded against by wise and prudent regulations. If the evil be of such magnitude as to demand stringent provisions reaching to exclusion, there is no constitutional objection to such legislation.

The reasoning for the law it was contended, established, amongst others, these propositions: that the traffic in wines and spirituous liquors has in the public judgment, as expressed through ages and centuries, demanded restraint and regulation: that if the right of a State to maintain police laws is complete and unqualified, there can be no constitutional conflict with the laws of the United States, as the power is absolute and supreme: See also 12 Wheat. 549, 550, 571, as to admitted police powers. The license system was adopted in England at a very early period of her history, and has ever since composed a part of the police system of that Kingdom: *Crabbe's History of the English Law*, 477. License regulations were adopted by the Provincial Legislature of New Hampshire: *Provincial Laws of New Hampshire*, ed. of 1761, p. 64, 143.

In giving judgment, Chief Justice Taney stated, p. 573, that "The validity of each of them (the laws) has been drawn in question upon the ground that it is repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States."

And at p. 577: "These laws may, indeed, discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

Mr. Justice McLean, in his judgment, observes at p. 589:

“A license to sell an article, foreign or domestic, as a merchant, or innkeeper or victualler, is a matter of police and of revenue within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, with any power possessed by Congress.”

And at p. 590: “The license system as adopted in all the States, restrains persons from selling by retail who have not taken a license; and a license to retail spirits is granted by the Court, or some other body, at its discretion and on certain conditions. The applicant to obtain a license must be recommended by a majority of the select men of the town, as a person of good moral character. * * The necessity of a license pre-supposes a prohibition of the right to sell to those who have no license. For if a State may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the public good may seem to require.”

And at p. 591: “A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduces the quantity of spirits consumed.

And at p. 592: In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power * * And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be

imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited."

Mr. Justice Catron, at p. 611, says: "I admit as inevitable, that if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and if the Court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce as already defined."

Mr. Justice Woodbury said, at p. 621: "The leading object of the license is to ensure the sales of spirits in quantities not likely to encourage intemperance, and at places and times and by persons conducive to that end.

And at p. 624: "This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government; and hence, as the Colonies under an Empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home; as towns, cities, and corporations do it through by-laws for themselves, after the State Legislature lays down the general principles; and as the war and navy departments, and courts of justice, make detailed rules under general laws; so here the States, not conflicting with any uniform general regulations by Congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress."

In deciding that these laws were constitutional several of the Judges referred to the doctrine now well established in the United States, that the powers which were not delegated by the State Governments to that of the United States remained with the States, and contended that the power to license and regulate the sale of wines and spirituous liquors was one which was not surrendered in giving to Congress the right to regulate commerce.

Here, however, our Local Legislature, it is contended, only possesses the powers expressly granted to it, the more extended powers remaining with the Dominion Legislature. Admitting this to be so for the purpose of the present discussion, it by no means follows that the Local Legislature does not possess the power in this matter which would be necessary to sustain the two by-laws referred to.

We must assume, what is not probably at all doubted, that the Imperial Legislature, in passing the British North America Act of 1867, introduced the various provisions as to the respective powers of the Local and Dominion Legislatures on the suggestion of, and on conference with the delegates from the various provinces, who had before that met to discuss the basis of the confederation.

As far as the Province of Upper Canada was concerned, the delegates who represented the views of that section of the United Province of Canada, well knew what the municipal institutions of Upper Canada were, and some one of them had probably introduced and carried through the Legislature, only a short time before, the Act passed on 15th August, 1866, entitled, "An Act respecting the Municipal Institutions of Upper Canada," 29-30 Vic., ch. 51. They knew that in the sections of that Act already referred to the power was granted to the municipalities in Upper Canada, under certain circumstances, to limit the number of taverns and to prohibit the licenses of shops for the sale of spirituous liquors in the several municipalities. When, then, this Imperial Act uses the very words of the title of this Bill in giving as one of the class of subjects on which the Provincial Legislature may pass laws, viz., "*Municipal Institutions in the Province*," can there be any reasonable doubt that it was expected and intended that the "municipal institutions" which were to be constituted under that authority, would possess the same powers as those which were then in existence, under the same name, in the Province? I should think not.

I think we may properly hold that the powers now contended for were intended to be, and were, vested in the provincial Legislature by these very words. Their being followed by:—"9. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes"—do not, in our opinion, shew it was the intention to limit the exercise of the powers which municipal institutions ought to have, and which they had had, of limiting the sale by retail in inns, or prohibiting the sale thereof in shops, but rather to remove all doubts as to their right to raise a revenue either for provincial, local, or municipal purposes by the issuing of these and other licenses.

The British North America Act of 1867 must have been passed on a conference with the delegates from the different Provinces, and the various provisions as to the powers and subjects of legislation by the Dominion and Local Parliaments must have been suggested by these delegates. Their suggestions must have been based on personal knowledge of the various modes in which legislation on those subjects had been had in the various Provinces before the Confederation, and if it had been intended that similar legislation should not have been continued as before by the various Provinces, there is no doubt that such intention would have been expressed in the Act.

And when words and expressions are imported into that Act which have been in common use in legislating for these Provinces, we must continue interpreting these words in the same manner and to mean the same thing as we decided they meant in statutes passed by our own Legislatures. It would create great difficulties and inconvenience if we did not act on this rule.

Under the 252nd section of the Municipal Act of 1866, it was declared that no tavern or shop license should be necessary for selling liquors in the original packages in which the same have been received from the importer or manufacturer, provided such packages contain respectively not less than five gallons or one dozen bottles.

The shop, saloon, and tavern licenses, I think we may

assume, were for the purpose of allowing the parties to sell *by retail*; and the prohibitory power, under the Municipal Act of 1866, was to prohibit the sale *by retail*—sec. 249, No. 9.

The reference to selling spirituous liquors *by retail* was made at a very early period, in relation to the sale of spirituous liquors in Canada. By the Imperial Statute 14 Geo. III., ch. 88, sec. 5, a duty of £1 16s. for any license to any person for keeping a house or any other place of public entertainment, or for the *retailing* of wine, brandy, rum, or any other spirituous liquors, was imposed. And by the Provincial Statute of U. C., 37 Geo. III., ch. 12, sec. 1: Every *shopkeeper* who sells wine, brandy, rum, or other spirituous liquors in less quantity, at any one time, than three gallons, shall *be possessed* of a license for that purpose.

The Legislature of the Province of Canada, up to the time of the confederation of the provinces, seems to have limited the granting of licenses *for the sale of wines and spirituous liquors* to shopkeepers, and to tavern and saloon keepers and the like, who sold *by retail*; and did not make it necessary for the importer or manufacturer to take out a license to sell when selling *by wholesale*, which, at first, was limited to quantities not less than three gallons, and latterly to five gallons.

The legislation as to the excise on the manufacture of liquors, and the licensing of those engaged in that business, seems to have been kept separate from the legislation as to granting licenses to shopkeepers and tavern keepers.

We think, looking at the legislation by the Province of Ontario as applicable to the giving the powers of limiting the number of taverns in a municipality or prohibiting the sale *by retail* of spirituous liquors by shopkeepers in such municipality, that this is a power which may be properly exercised by the Local Legislature as a matter chiefly of police, of a merely local and private nature, when it does not interfere with the sale of imported or manufactured liquors otherwise than as *by retail*.

We further think that the power may be exercised, looking at the nature of the legislation on the subject, under the power given to the Local Legislature to legislate exclusively in relation to municipal institutions, and that the power to legislate as to shop and other licenses, in order to the raising of a revenue, does not limit such power, but was so placed there rather with a view of removing all doubts as to the right of the Provincial Legislature *to raise a revenue by those means*.

In connection with this subject, and in reference generally to the discussion of constitutional questions, I will refer to the language of Chief Justice Marshall, when deciding such questions in the Supreme Court of the United States.

In *McCulloch v. The State of Maryland*, 4 Wheat. at p. 407, he said: "A constitution, to contain an accurate detail of all the sub-divisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

And again, at p. 409-410: "The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

And on p. 421: "We think the sound construction of the constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In *Brown v. The State of Maryland*, 12 Wheat. 436, the same distinguished Judge uses the following language : "It has been truly said, that the presumption is in favour of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality."

Mr. Justice Johnson, of the Supreme Court of the United States, in *Gibbons v. Ogden*, 9 Wheat. at p. 229-30, thus refers to commerce : "Commerce, in its simplest signification, means an exchange of goods ; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce ; the subject, the vehicle, the agent, and their various operations, become objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity that the nation which could not legislate over these subjects, would not possess power to regulate commerce."

We think the party who applies to quash these by-laws has failed to shew that the Legislature of the Province of Ontario had not a right to pass the statute under which they were framed.

On the contrary, we think they have the power conferred on them to pass such by laws by the reasonable and proper construction of the words of the British North America of 1867.

We think the course of legislation in Canada previous to the passing of that Act shews that the granting of licenses to sell wines and ardent spirits *by retail* was a matter properly entrusted to the municipal institutions in this Province, and that the power to prohibit such sale under certain circumstances was also proper to be entrusted to those institutions : that the power to legislate for such institutions necessarily carries with it the right to confer on such institutions all such powers, particularly of police, as could be most conveniently and with advantage to the community exercised by them, and when such matters may be said to be of a merely local and private nature in the Province, they cannot be said to interfere with the rights possessed by the Dominion Parliament.

We think the right to license brewers and distillers, and to impose duties of excise on their manufactures, is one that has never been conferred on municipalities in this country, and would not properly come within the power usually conferred on Municipal Corporations. They have always been looked upon more as matters of a *quasi* national character than of the character pertaining to municipalities. The imposition of taxes on wines and spirits imported from abroad has also been treated and considered in the same way; and in all our statutes of a prohibitory character, passed before confederation, the right of the importer and manufacturer to keep and sell wines and spirituous liquors by wholesale has been recognized and preserved.

The rights of the manufacturers and importers are not interfered with improperly by a municipality limiting the number of houses to be licensed or forbidding shops to be licensed within its territorial limits. This may be done by the municipalities, and importers and manufacturers still have the right to keep and sell by wholesale the articles of commerce which they have imported or made.

We think, therefore, the two by-laws, Nos. 53 and 54, are good on the objections taken to them. As to by-law No. 56, I suppose that is really of very little consequence. The objections to it are entirely technical, and cannot be of the least importance so far as this applicant is concerned, the real object of the application being to obtain the opinion of the Court as to the right of the Local Parliament to give the municipalities the powers which this village exercised in passing the other two by-laws moved against.

The first objection is, that it was not in the power of the municipality to pass the by-law in the month of July.

The Act of 1874 was in force when the by-law was passed, and sec. 9 of that Act makes it the duty of the Council to pass by-laws in the month of February in every year, which shall not be altered or repealed during the year from the first day of March following, for many purposes connected with the licensing of shops and taverns; and among them "Sub-sec. 8. For appointing annually one or more fit

and proper persons * * to be inspector or inspectors of licenses; and for filling any vacancy in such office." And "Sub-sec. 9. For fixing and defining the duties, powers and privileges of the inspector or inspectors so appointed; the remuneration he or they shall receive; and the security to be given for the efficient discharge of the duties of the office of inspector."

The repealed Act of 32 Vic., ch. 32, though, under sub-secs. 8 and 9 of sec. 6, providing for the appointing annually of an inspector of licenses, defining the duties, &c., did not contain the provision for filling up vacancies that is contained in the Act of 1874. The latter Act, by sec. 54, contains a provision for the appointment of a similar officer by the Municipal Council or Commissioners of Police, but that section does not refer to the filling of vacancies in the office.

No doubt the by-law required under the sec. 9 of the Act of 1874, so far as regards many of the objects to be provided for under it, must be passed not later than the month of February in every year; but I do not think that a by-law passed after that date must necessarily be void, say for filling a vacancy in the office which occurred after the passing of the by-law in February. The appointment to fill a vacancy must be made by a by-law, and when the office is vacant after the 1st of February, it would seem absurd that it must remain vacant until the following year. In this respect, I think we may hold this part of the statute directory, as the by-law in question appears, by the affidavit, to have been passed to fill a vacancy caused by the resignation of the person appointed under a by-law passed on the 17th February, 1874; and as the vacancy occurred in the month of July, the by-law could not be passed before that month. No doubt the statute referred to in the by-law was repealed when the by-law was passed; but the municipality, under the Act of 1874, had power to fill the vacancy in that office, and he was not only appointed to enforce the provisions of the repealed Act and the Acts mentioned in the recital, but the by-law of the Corporation respecting shop and tavern licenses.

We do not see how a by-law to fill up a vacancy can be set aside because it does not define the duties, powers, and privileges of the officer, or his remuneration. The Council may not have done all their duty; they may be compelled, if necessary, to do the rest of their duty if anyone suffers from their not doing it. The same observation will apply to the omission to fix the remuneration of the office.

The by-law is perfect in itself. It may be another by-law may be necessary, but because that other has not been passed, if it was necessary to do so, is no reason for vacating the one which has been passed.

Next as to the objection as to its not being passed at a proper meeting of the Council.

At the time the Reeve had not been sworn into office, and there was no other head of the Council. The special meeting of the Council provided for under sec. 178 could not have taken place under that provision.

Under it the head of the Council *may* at any time summon a special meeting thereof, and *it shall be his duty* to summon a special meeting when requested *in writing* by a majority of the members of the Council.

Here there was no head to call the meeting; two members requested the Clerk to call one; four out of the five of the members attended; the Reeve was not then sworn into office and did not attend.

There were four present when the by-law was passed. It is not said the Reeve had not notice. At the next monthly meeting the Reeve was requested to sign the bylaw; he refused; and at the next meeting, held on 6th August, it was moved, seconded, and carried, that the same should be signed by the chairman of the meeting at which it was passed, and this was done.

We think we ought not to interfere with this by-law on any of the objections raised. Though the Acts of 1873 and of 1869 are repealed by the statute of 1874, yet by that Act the by-laws then in force were continued until repealed, or other provisions made as to the matters under that Act.

The rule will be discharged with costs.

Rule discharged with costs.

REGINA V. JAMES TAYLOR.

IN THE QUEEN'S BENCH AND IN ERROR AND APPEAL.

Sale of liquor—37 Vic., ch. 32, O.—British America Act 1867, secs. 91, 92—Powers of Dominion and Provincial Legislatures.

- Held*, in the Court of Q. B. : 1. That the Dominion Legislature alone has power to tax and regulate the trade of a brewer, which is a branch of trade and commerce, and having done so, the Ontario Legislature has not the power to restrain it, unless in a qualified manner, and for the mere purposes of police.
2. That the prohibition to keep, have, or sell beer, by a brewer, by wholesale, unless under a license and the payment of a tax therefor, is an excess of power by the Provincial authority, and is a restraint and regulation of trade and commerce, and not the exercise of a police power.
3. That the restriction imposed by the Ontario Legislature on brewers not to sell by retail, as defined by the Act of 1874, 37 Vic., ch. 32, is not *ultra vires*, because it is a mere repetition and renewal of the legislation which was in force here before and at the time of the confederation.
4. That the right conferred on the Ontario Legislature to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses, for the purposes of revenue, does not extend to the licenses on brewers and distillers, over which the general government only and at all times, exercised jurisdiction, and which are of a higher and different class than the licenses of retail dealers which are mentioned; and the words "other licenses" have reference to licenses of the kind before stated, such as on billiard tables, livery stables, &c., which are chiefly enumerated in municipal acts.
5. That the Ontario Legislature has a right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of confederation the exercise of these powers, and because such power, read in connection with sec. 92, sub-sec. 16 of the Confederation Act is now a matter of "a merely local or private nature in the province." That power is in restraint of trade as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion government, must be considered to be modified by the powers which the Ontario Legislature, acting in relation to municipal institutions, may properly exercise.
- Per Wilson, J.* The Crown is not obliged, under sec. 44, to prosecute before two magistrates, as a private individual would be, but may proceed in this Court by information.
- Remarks as to the form of the information in this case.

It was *Held*, in Error, reversing the above judgment of the Queen's Bench, that the Statute 37 Vic., ch. 32, was within the powers of the Provincial Legislature.

Semble, the "exclusive Legislative authority" of the Parliament of Canada, mentioned in sec. 91 of the B. N. A. Act, does not mean exclusive of the Provincial Legislatures; but it was intended rather as a more definite or extended renunciation on the part of the Imperial Parliament of its power over the internal affairs of the Dominion.

Per Strong, J., a license which would amount to prohibition would be an undue interference with the exclusive powers of the Dominion Parliament as to trade and commerce.

ERROR. Information for penalties, filed by the Attorney-General of the Province: That the defendant, of the town

of St. Catharines, in the county of Lincoln, brewer, on the 10th day of November, 1874, after the passing of the Act of the Legislative Assembly, of the Province of Ontario, made and passed in the 37th year of Her Majesty's reign, intituled: "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," then being a brewer, licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, did manufacture large quantities of fermented liquors, to wit, 1,000 gallons of beer; and afterwards, to wit, on the 11th of November aforesaid, at the town of St. Catharines, aforesaid, unlawfully and wilfully, and in contravention of the said Act of the Legislative Assembly, did sell by wholesale a large quantity of the said fermented liquor, so manufactured by him, to wit, 500 gallons of beer, for consumption within the province, to wit, at St. Catharines, in the county aforesaid, without first obtaining a license, as required by the said Act of the Legislative Assembly, to sell by wholesale, under the said Act, liquor so manufactured by the defendant for consumption within the province, and without having obtained any shop license or any other license under the said Act, in wilful contravention of the said Act, and in contempt of our Lady the Queen and her laws, and to the evil example of all others in the like case offending, and contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And therefore the said Attorney-General, &c.

Demurrer, for that the information and the matters therein contained are not sufficient in law, and that the defendant is not bound by law to answer the same.

The special matter stated for argument was, that the Legislature of this Province had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

Joinder in demurrer.

In Michaelmas Term, November 27, 1874, *Harrison*, Q.C., argued the demurrer for the defendant. The same point was before this Court in *Regina v. Scott*, 34 U. C. R. 20. The statute in question, 37 Vic. ch. 32, O., goes beyond what the law was before. Sec. 4 shews what 'wholesale is; see also sec. 21. Sec. 24 prohibits the sale of liquor without a license first obtained under the Act, which covers the sale by a brewer of his own manufacture. Sec. 26 also applies to the license. The fee for the license by sec. 22 is \$50, for selling by wholesale. Sec. 35 imposes the penalties for selling without such license, and by sec. 53 the burden of proving the license rests on the party prosecuted. It is contended for the defendant that the imposition of this sum for a license upon the defendant, as a brewer selling by wholesale, is an act beyond the power of the Ontario Legislature, and that it is contrary to the Act of Confederation. The Provincial Legislature claims the power of passing the Act in question under sec. 92, of the Confederation Act, sub-sec. 9, by which such Legislature may exclusively make laws in relation to matters coming within the classes of subjects therein enumerated, and among them is specified: "Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes." But that provision must be construed as referring to licenses for mere purposes of police. The whole of sec. 92 must be governed by sec. 91, which enumerates the powers of the Dominion Parliament. The Dominion derives its income from customs and excise, which are regulated by 31 Vic., ch. 8, D. The Dominion Parliament has the power to pass laws for "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation;" sec. 91, sub-secs. 2 and 3. These enactments should be read as meaning the same as provisions 1 and 3 of sec. 8, in the United States Constitution, which are: 1. "To lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises, shall be uniform

throughout the United States. 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." He cited : *Cooley's Const. Limitations*, 2nd ed., 10, 582-6 ; *Brown v. State of Maryland*, 12 Wheat. 419 ; *Lincoln v. Smith*, 27 Verm. 328, 335 ; *The License Cases*, 5 How. 504 ; *Bradford v. Stephens* 10 Gray 379 ; *The Passenger Cases*, 7 How. 283 ; *State, v. Robinson*, 49 Maine 285. These references shew that in the United States the importer is not taxable by the local State, although the purchaser from him may be because in that case the article becomes one of a local, nature. That independent local power we do not possess here. Here, too, it is the manufacturer who is taxed, and he, of course, makes the article for sale. It is, therefore, a direct tax on trade and commerce, and it is also an interference with the right of the Dominion to raise money by taxation for revenue. In the case of *Gibbons v. Ogden*, 9 Wheat. 1-14, and *Almy v. The People of the State of California*, 24 How. 169, the laws of the Local Legislature were held to be invalid. The last case was only for putting a stamp on bills of lading. A poll tax was held to be void, because against the powers of Congress over commerce : *Lin-Sing v. Washburn*, 20 Cal. 534. "Commerce" includes also the transportation of passengers, and a tax on them is a restraint of trade : *People of the State of California v. Raymond*, 34 Cal. 492. As to the meaning of the power "to regulate," see *Harrison's Mun. Manual*, 3rd ed., 344, note (d).

McKenzie, Q.C., and *Robinson*, Q.C., contra. The Ontario Act applies to sales of liquor made for consumption within the province. The defendant, as a brewer, pays to the Dominion Government for his license \$50. But the Ontario Government may also make a charge for purposes of revenue, which by sec. 92, sub-sec. 9, it is expressly authorized to do. There are many very important American decisions upon the subject : *The License Cases*, 5 How. 504, 574, 577 ; *Ward v. The State of Maryland*, 1 Am. R. 50 ; *The License Tax Cases*, 5 Wallace 462 ; *Cooley v. Board of*

Wardens of the Port of Philadelphia, 12 How. 299; *Bode v. The State of Maryland*, 7 Gill 326; *Metropolitan Board of Excise v. Barry*, 34 N. Y. 657; *Nathan v. State of Louisiana*, 8 How. 73; *Commonwealth v. Holbrook*, 10 Allen 200; *People of the State of Illinois v. Thurber*, 13 Illinois 554; *Brown v. State of Maryland*, 12 Wheat. 419, chiefly at p. p. 436, 447, 448; *Gibbons v. Ogden*, 9 Wheat. 1, at p. p. 29, 212. See also, in our own Courts, on the *Regina v. Boardman*, 30 U. C. R. 553; *Beard v. Steele*, 34 U. C. R. 43; *Canada Central Railway v. Regina*, 20 Grant 273; and *Regina v. Paige* (decided in the Superior Court of Quebec), 10 C. L. J. N. S. 135.

This is a subject over which the Ontario Legislature have full power. If it have not, and if the Provincial Parliament encroach on the Dominion powers, the bill may be disallowed by the Dominion authority. As the Act has not been disallowed, that of itself is some argument in its favour; the presumption is in favour of it while it stands: *Barclay v. The Municipality of the Township of Darlington*, 5 C. P. 432. It is argued for the defendant that the present statute is an invasion of the exclusive rights of the Dominion Government to regulate trade and commerce, and to raise a revenue by taxation. But there is no such excess of power, for the Ontario Legislature has exclusive jurisdiction to impose the tax now in dispute, either for purposes of police or of revenue, under sec. 92, sub-secs. 8, 9 16, and the tax is in reality for one, or for both of these objects. There is no ground whatever for surmising that it is in any way vexatious or burdensome in fact.

Harrison, Q.C., in reply. The fact that the statute may be, but has not been disallowed, is no argument in its support. If it be an unconstitutional Act it is void. Sec. 92, sub-sec. 2, which gives the Province power to impose direct taxation within the Province, to raise a revenue. means a general tax upon all persons, and not a tax to attach upon a particular class, as here, upon brewers. Sub-sec. 9 applies to a tax which may be put upon classes, as shopkeepers, &c. A tax may be imposed by a city cor-

poration to cleanse a harbour, although it cannot be for general purposes of revenue: *In re Campbell and the Corporation of the City of Kingston*, 14 C. P. 285. 285. This is purely a matter of customs and excise, and a subject therefore which is within the exclusive jurisdiction of the Dominion Government: see 31 Vic. ch. 8, sec. 122, D. It is not a police regulation. It is, and must be, an interference with the Dominion tax and license, and is therefore unconstitutional. The Ontario Legislature has discriminated between the sale of goods the produce of the Province, and those not the produce of the Province. Pedlers are to pay no license in the former case, in the latter case they are: Municipal Act 1873, sec. 383, subsec. 3. The Ontario Acts, 33 Vic. ch. 28, sec. 1, and 36 Vic. ch. 34, section 1, expressly excluded brewers, "duly licensed by the Government of Canada," from the operation of these Acts, but they have both been repealed by the 37 Vic. ch. 32.

March 16, 1875, WILSON, J., delivered the judgment of the Court.

This demurrer raises the question of the constitutionality of the statute referred to in the plainest and most direct manner. The Act which is in dispute is the 37 Vic. ch. 32, of the Ontario Legislature.

The clauses to be considered are the following: "Sec. 24, "No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors within the Province of Ontario, without having first obtained a license under this Act authorizing him so to do; provided that this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency."

Sec. 25, "No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors, for the purpose of selling, bartering, or trading therein, unless duly licensed thereto, under the provisions of this Act."

Sec. 26 is also governed by this case, and it specially names brewers and distillers.

Sec. 22 enacts that there shall be paid for each license by wholesale a duty of fifty dollars. All the duties under this section are for provincial revenue.

By sec. 4, "A 'license by wholesale' shall be construed to mean a license for selling, bartering, or trafficking by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel, at any one time; and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine, or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

This section is very like sub-sec. 3 of sec. 12 of "The Temperance Act of 1864," which, in express terms, applies to brewers and distillers.

Section 35, subjects any person who shall sell or barter such liquors without the license therefor by law required, for the first offence, to a penalty of not less than twenty dollars, besides costs; for the second offence, to imprisonment in the County Gaol of the County in which the offence was committed, to be kept at hard labor for a period not exceeding three calendar months; for the third and any after offences, to imprisonment in the County Gaol of the County in which the offence was committed, to be kept at hard labor for a period of not less than one, nor more than three calendar months.

The 44th section of the Act and its different sub-sections shew, I think, that this Court would have no jurisdiction to entertain any suit for a violation of any of the matters mentioned in them at the instance of a private prosecutor.

But I am of opinion the Crown is not within their terms. The clause provides for the prosecutor or complainant being a competent witness, which cannot apply to the Crown.

The Crown may, therefore, by its prerogative prosecute in any Court it pleases, and lay the venue where it elects: *Com. Dig. Prerogative D.*, 85; *Attorney-General v. Churchill*, 8 M. & W. 171.

The case cannot fail then for the want of jurisdiction of this Court to entertain it. The counsel did not argue any such point before us, but if we had clearly been of opinion the jurisdiction belonged to another tribunal, we must have declined to adjudicate in the cause.

The right of the Ontario Legislature to pass and maintain the provisions of the Act which are impeached, must rest upon one or more of the following powers, over which it has exclusively the authority to legislate, and which are contained in sec. 92 of the Confederation Act, and are numbered therein as follows: 2. "Direct taxation within the Province, in order to the raising of a revenue for provincial purposes." 8. "Municipal Institutions in the Province." 9. "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." 13. "Property and civil rights in the Province." 16. "Generally all matters of a merely local or private nature in the Province."

These powers must, however, be exercised subject and subordinate to the power and authority of the Dominion Parliament, which is provided for as follows in the Confederation Act, sec. 91: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

* * 2. "The regulation of trade and commerce." 3.

“The raising of money by any mode or system of taxation.”

* * “And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

The Dominion Parliament plainly has the right to require a brewer to take out a license to carry on his business, and to make a charge therefor, either under the head of “The regulation of trade and commerce,” or “The raising of money by any mode or system of taxation.” Subject to the Imperial authority, as declared by the Imperial Act 28-29 Vic. ch. 63, sec. 3, it has the general powers of a sovereign state, excepting those which have been specially conferred upon the Provinces.

In that respect the relations of the Provinces to the Dominion are just the reverse of those which the States of the American Union bear to the United States.

The Provinces have properly a written and defined constitution, limited as to purposes and objects. The Dominion has in part a written and defined constitution, but it is not wholly limited by it. It possesses powers which are neither defined nor limited, excepting by the Confederation Act and the Imperial Statute 28 & 29 Vic. ch. 63. It may be said to have general jurisdiction, or, in the language of constitutional writers, general sovereignty, in all matters but those in which it is expressly excluded, or in which from the inherent condition of a dependency it is necessarily and impliedly restricted.

It must be considered whether the Act of the Ontario Legislature conflicts with the Dominion power of raising money by any mode or system of taxation, or with the power to regulate trade and commerce.

It is in the nature of things almost unavoidable to prevent a conflict arising between the two Legislative bodies in the due exercise of their respective powers, most of which from necessity are described in general and comprehensive

terms, as it is impossible to express the details in any other way less than a code. But the code itself would have to be supplemented from time to time, and even then, with all the elaboration it received, it would not be so convenient or practical or comprehensive, or useful for all purposes, as the simple enumeration of the rights and powers intended to be exercised under the general terms by which they are commonly known, and which are quite as well understood as, and perhaps better than, they could be if it were attempted specially to define them. The Courts under such constitutions which the Dominion and the Provinces possess will be obliged to declare when, in their opinion, the Dominion has encroached upon the exclusive powers of the Provinces, and when the latter have usurped the higher powers of the Dominion, and also whether the Dominion has exercised its powers properly subordinated to the Imperial Statute, before mentioned, which regulates the validity and extent of Colonial Legislation and Government. There can be no restraint put upon the due exercise of the judicial power by any authority, Dominion or Provincial, for that would be to place these bodies above the law which created them, and granted them powers which are not absolute, and which no legislation of theirs can make so.

The question now to be determined is, whether there is a conflict between the Ontario Statute and the Act of Confederation on the subject before us. Has the Ontario Legislature the power to oblige the brewer to take out a license as an authority to carry on his trade, and to put a charge or duty for that purpose on the license, and to punish him if he follow his business without it? If this is a regulation of trade and commerce, it cannot be justified by any of the powers which are vested in the Provincial authorities, nor can it be supported, if it be not a direct tax.

Customs and excise are not among the enumerated powers given to the Dominion. There are different sections of the Act which confer such a power upon it, if it were necessary to have done so. See *The British North America Act, 1867*, secs. 102, 122.

The Dominion has power over customs and excise by its general sovereignty, but it is singular such important branches of government should not have been expressly enumerated. They are covered also, I think, by the powers to regulate trade and commerce and to raise money by any mode or system of taxation. In my opinion the Dominion Parliament rightly imposed its duty upon the brewer as a regulation of trade and commerce, or as one mode or system of taxation.

Has the Ontario Legislature, under any of the heads before specified, the power to impose its charge and duty upon him also, in the manner in which it has done it?

Is it a direct tax under power number 2, of sec. 92?

"A tax may be either *direct* or *indirect*. It is said to be *direct* when it is immediately taken from property or labour; and *indirect* when it is taken from them by making their owners pay for liberty to use certain articles, or to exercise certain privileges": *McCulloch* on Taxation and Funding, 2nd ed., p. 1.

"Indirect taxes have, with few exceptions, been the greatest favourites both of princes and subjects, and there are very sufficient reasons for the preference of which they have so generally been the object. The burden of direct taxation is palpable and obvious. It admits of no disguise or concealment, but makes every one fully sensible of the exact amount of the demand made upon him by Government. * * * There is in the great majority of cases a strong disinclination to the payment of direct taxes. For this reason Governments have generally had recourse to those that are indirect; instead of exciting the prejudices of their subjects by openly demanding a portion of their incomes, they have taxed the articles on which these incomes are usually expended." *Ibid.* p. 147.

"Direct taxes are those upon rent, profits, wages, property, and income. Indirect taxes are those on necessities and luxuries, raw produce, customs, inland duties, the conveyance of letters, and some others. Under the head of inland duties, excise is of course included, and as

a part of excise the rates of duty on licenses are included, as upon auctioneers, brewers," &c. : *Ibid.* p. 242.

"The licensing of lotteries is also a mode of raising a revenue by indirect taxation : " *Ibid.* p. 321.

In *Mill's Principles of Political Economy*, People's Edition, London, 1872, it is said taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price. * * * A house tax, for example, is a direct tax on expenditure if levied, as it usually is, on the occupier of the house. If levied on the builder or owner, it would be an indirect tax : " pp. 495-6.

"By taxes on commodities are commonly meant those which are levied either on the producers or on the carriers or dealers who intervene between them and the final purchasers for consumption. * * * To whatever class they belong and at whatever stage in the progress of the commodity they may be imposed, they are equivalent to an increase of the cost of production, using that term in its most enlarged sense, which includes the cost of transport and distribution, or, in common phrase, of bringing the commodity to market : " *Ib.* pp. 504-5.

I need not say more, after making these extracts, than that the charge or duty imposed by the Ontario Legislature upon brewers is not a direct but an indirect tax, and that the effect of it is to raise the price and value of the beer by at least the amount of the tax. The amount imposed is not so much the subject of complaint or enquiry as the right or power to impose it at all, for if a small

sum can be imposed, so also can a large sum—large enough materially to restrict the manufacture or to enhance the price of beer. The power of the Dominion to raise money “*by any mode or system of taxation*,” covers both direct and indirect taxation in all cases, and the power is so expressed to distinguish it from the limited power conceded to the Provinces to proceed only by way of direct taxation.

But it must not be supposed that Ontario can in no case levy an *indirect* tax. It will be found that can be done where the powers relating to licenses and Municipal Institutions are exercised, under those which are numbered 8 and 9.

Can, then, the charge in question be supported by reason of the exclusive power which the Ontario Legislature has over Municipal Institutions, under power number 8?

The Legislation in force on this subject in Ontario at the time of the passing of the Confederation Act was as follows:—The 27-28 Vic. ch. 3, as amended by the 29 Vic. ch. 3, contained substantially what is, since our new constitution, the Inland Revenue Act of 1867.

Sec. 6 of the first of these Acts, and its sub-secs., correspond with sec. 3 and its sub-secs. of the Act of 1867, as to the license to be taken out by brewers and its effect. There was also in operation at the time, “The Temperance Act of 1864” and the Municipal Act of 1866.

By sec. 12 of the Temperance Act, power was conferred upon municipal bodies to provide by by-law that no person should expose or keep for sale, or on any pretence or by any device sell or barter, or in consideration of the purchase of any other property, give to any other person any liquor forbidden by the Act, unless it were for exclusively medicinal or sacramental purposes, or for *bonâ fide* use in some art, trade, or manufacture, or unless it was authorized by the third or fourth sub-sections of that section.

Sub-sec. 3 provided that any licensed distiller or brewer, having his distillery or brewery within the municipality, may expose and keep for sale such

liquor as he had manufactured thereat, and no other; and may sell the same thereat in quantities not less than five gallons at any one time, and wholly to be removed in not less than five gallons at a time; and that any licensed brewer might sell bottled ale or porter of such manufacture in quantities not less than one dozen bottles of at least three half-pints each at any one time, and wholly to be removed in quantities not less than one dozen bottles at a time.

The fourth sub-section does not apply here.

The collector of inland revenue was to be notified of every prohibitory by-law passed or repealed—see secs. 6 and 11 of that Act—and when so notified of any prohibitory by-law being passed for any place, he was not to issue any shop or tavern license for that place.

When, therefore, in sec. 12, sub-sec. 3 of that Act any *licensed* distiller or brewer is spoken of, it must mean licensed under the Government Excise Act, and not by or under any municipal regulations, for there was then no municipal power or regulation to license or prohibit brewers from manufacturing or selling by wholesale.

By the Municipal Act of 1866, sec. 249, sub-sec. 9, every municipality might by by-law which was approved by the electors, prohibit “the sale by retail of spirituous, fermented or other manufactured liquors in any inn or other house of public entertainment,” and *prohibit totally* the sale thereof in shops *and places* other than houses of public entertainment.”

That provision related only to sale by retail; and, besides that, the words “shops and places other than houses of public entertainment” in that Act do not include distilleries or breweries, for the following reasons:—1. Because sec. 249, sub-sec. 9, is governed by sub-section 1, and breweries and distilleries are plainly not within it; 2. Because they were under Government control and surveillance; 3. Because the Temperance Act, which was then in force, so far as it was consistent with the Municipal Act, had made express provision for breweries and distilleries;

4. Because sec. 252 of the Act, which permitted liquors without a shop or tavern license to be sold in the original packages of the importer or manufacturer of not less than five gallons or one dozen bottles, was just the provision in the Temperance Act applicable to breweries, and would apply to breweries; and, 5. Because “shops *and places* other than houses of public entertainment” are not words which extend to places of manufacture, nor to places such as breweries, where much larger quantities of liquor are dealt with and sold, and so in that respect one of much more consequence than the kind of places which are referred to in connection with shops.

“The proper meaning of these words depends upon the effect of the maxim *Noscitur a sociis*: *East London Water Works Co. v. Trustees for Mile-End Old Town*, 17 Q. B. 512; *Reed v. Ingham*, 3 E. & B. 889.

There was no statute at the passing of the Confederation Act, or at the time of the passing of the Inland Revenue Act of 1867, which gave any right or power to the Municipalities to require a brewer to take out any other license than a Government license—that is, one under the Excise or Inland Revenue Act—nor which gave any right or power to any Municipality to prohibit the manufacture of beer within its limits, or the sale therein of beer so manufactured, so long as the sale was in quantities not less than five gallons or one dozen bottles at one time.

The Ontario Act of 1874 is the first statute which has expressly imposed upon the brewer the necessity of taking out a license under Provincial authority, in addition to the general Excise or Inland Revenue license which is taken out under the Dominion Act. We must therefore determine, with what light we have from our legislation, what the law is, upon a just construction of the powers which are conferred upon the two bodies by the Act of Confederation.

The license from the Dominion Government is an authority to manufacture beer, and, by implication and by

something more, is an authority to sell the article when made, subject to the duties of the Act. The Inland Revenue Act, sec. 2; Tit. Brewer, sec. 3, sub-sec. 3, and sec. 127, sub-sec. 3, and the authorities hereafter referred to, will be found to support this proposition to its full extent.

We are of opinion, on the legislation referred to, the Ontario Legislature cannot support the imposition of this tax, under the power which they have to deal exclusively with Municipal Institutions.

Does then the Ontario Legislature possess the right to impose the tax under the power, number 9, which enables it to deal exclusively with "shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes"? The answer to the question depends upon the meaning to be given to the words, "and other licenses." What has been said as to the meaning of the words "shops *and places, other than* houses of public entertainment," may be applied to the words which we are considering.

The effect of the words "and other licenses," must be determined by the rule adverted to, of *noscitur a sociis*. They seem to have a proper connection with, and affinity to, those licenses which are commonly mentioned and found along with shop, saloon, tavern, and auctioneer licenses, and which are chiefly contained in the Municipal Act, such as licenses on billiard tables, victualling houses, ordinaries, houses where fruit &c., are sold, hawkers and pedlers, transient traders, livery stables, cabs, intelligence offices, and perhaps other licenses in the regulation of markets, and in some other cases.

It may be said, then, why should not the Ontario Legislature possess the right also over the licenses of brewers and distillers? The answers are, the business of these persons is not specified plainly in the statute giving the Ontario Legislature the power over them; and it is an established rule, that a statute which imposes a tax must be strictly construed—*a fortiori*,

must a claim of right to impose a tax be strictly construed, whether it be by the Crown, or by any subordinate power or person whatsoever. And the business of a brewer has always been dealt with as a matter of excise, and of direct Government control, and is so still.

And there are special reasons for it. The brewer cannot begin his business without leave from the Dominion Government. He must specify the nature of his building and its fitting up with great particularity. He cannot alter or add to his premises or apparatus, or remove any part of it without notice. He must label distinctly every room, granary, kiln, and vault, stating its name and purpose. He must keep books of account, in which his business details are entered, and they must be open at all times to inspection. He cannot remove any of the beer he manufactures without a permit. He must submit his whole premises and business to the most rigid inspection. He must give a bond with sureties for his due compliance with all the requirements of the statute, and he is subject to very severe penalties and forfeitures for dereliction or neglect of his statutory duties. It cannot be said that a business of that nature is one which is covered by, or included within the general words "and other licenses," especially when these words are in association with licenses of a very inferior and different class, and which relate only to sales by retail, while the brewer's license relates to sales by wholesale.

The next question is, can the imposition of the charge or duty be maintained under the power No. 13, which the Provinces have, to make laws in relation to "Property and civil rights in the Province."

These are subjects of a very comprehensive range. Everything may be said to be embraced within the generality of these terms. We have nothing, as members of a community, which is not either property or a civil right. There is no law which does not, and none that can be passed which will not, relate to property or civil rights.

The terms must be limited by the powers which are expressly or necessarily by implication vested in the Do-

minion Parliament, for that body has exclusive power over many subjects of property and of civil rights, and also general sovereignty.

Will powers which the provinces possess over property and civil rights, limited as that sphere must be by the general powers of sovereignty which the Dominion Parliament has, extend to and authorize the Ontario Legislature to put a charge or duty, by way of license, on a brewer to sell the beer he makes? The beer he sells is certainly property, and his right to sell is a civil right. The beer he has is also an article of trade and commerce, and the business he follows, by sale or otherwise of his commodity, is trade and commerce.

The Dominion authority has exclusive jurisdiction to regulate trade and commerce. The Ontario Legislature has exclusive jurisdiction to make laws relating to property and civil rights. Have the two bodies, by virtue of these respective powers, the right to restrain a brewer from following his business, unless licensed by each of them so to do; or, what is the same thing, can the Dominion authorize him, if licensed by it, to follow his business, and can Ontario forbid him, notwithstanding that license, from following it unless he is also licensed by it? I think the statement of the facts shews that the license of the Dominion is a regulation of trade and commerce, and that the license of the Ontario Legislature is in restraint of that regulation, although it does relate to property and civil rights. It does relate to property and civil rights, but it does so by restraining and in that way regulating trade and commerce, and to that extent it usurps the power it should be subordinated to.

I do not think the charge or duty can be sustained as relating to property and civil rights, by a just consideration of the powers which are vested in the Dominion Parliament.

The next question is, whether the tax can be supported under the power, number 16, which is vested in the Ontario Legislature, to legislate upon, "generally all matters of

a merely local or private nature in the Province." I think it cannot, and that what has been said in considering the matter under power number 9, will apply here.

The business of a brewer—dealt with, as it always has been and still is, as a matter of Governmental regulation and control in an especial manner, and which never has been placed under any other authority—cannot be said to relate to matters of *a merely local* or private nature.

I desire to add here some general observations upon the powers which I have been considering.

The power which is vested in Ontario to raise money by direct taxation excludes, of course, as a general rule, the right to raise it by indirect taxation. But by means of the powers numbers 8 and 9, relating to licenses and to municipal institutions, it is plain that Ontario may and does by virtue of these powers raise very large sums of money by indirect taxation. Power number 2 must be read as qualified in its absoluteness, therefore, by powers numbers 8 and 9. Power number 13, as to property and civil rights, must be qualified in its turn by power number 2, for the right to deal with property and civil rights will not authorize the levy of an indirect tax.

The Dominion power to regulate trade and commerce must also be qualified by the Provincial right to levy direct taxation, and by the due exercise of the powers over licenses and municipal institutions. And all that may be done, if not with the finest precision, at any rate with sufficient exactitude for all practical purposes.

The cases which I refer to on the subject are the following, although I have read and referred to the whole of those which were cited on the argument:—

In the case of *Brown v. The State of Maryland*, 12 Wheat. 419, it was decided in the Supreme Court of the United States, that an Act of the State of Maryland, which required all importers of foreign goods, and other persons selling the same by wholesale, to take out a license from the State, for which they should pay \$50, to authorize them to sell such goods, and

which subjected the parties for violation of the law to forfeitures and penalties, was repugnant to that provision of the constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws," and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian Tribes":—that the article imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package, or vessel in which it was imported; and that the authority to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; but when the original package was broken up for use or retail by the importer, or had passed from his hands to a purchaser, the article ceased to be an import or a part of foreign commerce, and became subject to the law of the State in which it was, and might be taxed for the purposes of that state, and the sale of it might be regulated by such State like any other kind of property.

It was stated in the same case that there was no difference between the power to prohibit the sale of such an article by the importer, and the power to prohibit its introduction into the country—the one was a necessary consequence of the other:—that no goods would be imported if they could not be sold when imported:—that if a light duty could be imposed so also might a heavy one amounting to a prohibition. But that the question of power did not depend upon the degree to which it was exercised, but upon the right to exercise it at all. It was also said that a tax not on the article, but on the person, was varying the form without varying the substance.

The next cases to which I refer are *The License Cases*, 5 How. 504. There the laws of the three States of Massachusetts, Rhode Island, and New Hampshire were in question.

In the case of Massachusetts, the law provided that no

person should retail or sell wine, &c., in a less quantity than 28 gallons, which should be delivered and carried away all at one time, unless he were first licensed so to do, but that the County Commissioners should not be obliged to grant any license if, in their opinion, the public good did not require it to be granted.

In the case of Rhode Island, the law prohibited the sale of such liquors in a less quantity than ten gallons. In this case the parties indicted had sold liquors, duly imported from France, which they had bought from the importer.

In the case of New Hampshire, the law was of the like general nature; but in that case the liquor sold was American gin, purchased in Boston, and carried coastwise to New Hampshire, and there sold in the same barrel.

In all these cases the decision of the Supreme Court of the United States was that none of these laws were inconsistent with any of the provisions of the Constitution of the United States, or with any of the Acts of Congress on the subject.

The Chief Justice, at p. 577, said that, "spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction."

Then he pointed out that the laws in question did not interfere with the spirits while they remained (as in the case of Rhode Island) a part of foreign commerce. They acted wholly upon the retail or domestic traffic of the article within the borders of the respective States. They acted upon it after it had passed the line of foreign commerce and become a part of the general mass of property

in those States. And that, although a State could not object to receive an article permitted by Congress to be imported into the State, the State was not bound to furnish a market for the article when it was imported ; and that the State might pass any law which it deemed necessary to guard the health or morals of its citizens, although such law might discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government.

Mr. Justice Catron, at p. 608, was of opinion that the State could not exercise any police power over either foreign commerce or commerce between States, over which matters Congress had supreme power ; but so long as Congress, although having the power to legislate, had not legislated on the subject, the State might legislate upon it:—that the State law could only be invalid when it conflicted with the law of Congress.

These are the principles enunciated and decided upon by the Court in the cases referred to, and they determine that the tax in the form of a license upon the brewer, or upon the selling, bartering, or trafficking by wholesale in liquors, imposed by the Ontario Legislature, is a restraint upon the business or trade of a brewer, and is an interference with trade and commerce, over which the Dominion Legislature has supreme power, and upon which it has expressly legislated, if that should be of any consequence ; and, in my opinion, the Act of the Ontario Legislature is in that respect, and to that extent, void and unconstitutional.

The *License Tax Cases*, 5 Wallace 462, and *Commonwealth v. Holbrook*, 10 Allen 200, determined that licenses granted under a law of Congress did not confer on the licensees the power to sell under them, when the law of the State prohibited the sale of the articles, as Congress had not supreme power over the internal trade of a State.

There is another case to which it is necessary to refer, as it is a decision of our own Court. It is the case of *Beard v. Steele*, 34 U. C. R. 43, cited in the argument.

Perhaps it was not strictly a decision upon the point for

which it was cited, as it was not necessary to determine it. I did, however, in that case express my opinion that the 33 Vic., ch. 19, O., was not an unconstitutional Act, as an interference with trade and commerce in the matter then before us, which related to a bill of lading. That Act contains three sections.

Sec. 1. "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon, or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made to himself."

Sec. 2 is a clause merely guarding against any rights of stoppage in *transitu*, &c., being prejudiced or affected by reason of the change made in the law.

Sec. 3 makes the bill of lading, held for valuable consideration, representing goods to have been shipped conclusive evidence of such shipment against the person signing the same, although the goods were not shipped, unless he can show the misrepresentation was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims.

The second and third clauses do not interfere with trade—the second being a mere saving clause, and the third being a mere rule of evidence. The first clause gives to the person who has the property in the goods the rights and charges him with the liabilities in respect of them, as if the contract had been made with him. It annexes the right of contract to the right of property. Is that a regulation of trade and commerce?

It did not seem to me, at the time, to be a regulation of trade, and it does not seem to me to be so now: *The Passenger Cases*, 7 How. 283, at p. 353. It does, however, *affect* trade and commerce. But what enactment will not, in some way or other, affect it? If an Act were passed requiring

every person who instituted a suit to give security for costs, or still further limiting the time within which to bring an action, or enacting that no execution should be issued on a judgment until a demand was first made of the sum recovered on the person liable to pay it, or giving to the holder of a bill of exchange, or promissory note, a lien for the amount due upon it on the goods of the acceptor or maker—all these provisions, and many other cases which might be put, would very much affect trade and commerce, but could they be said to be a *regulation* of it? I certainly think they could not. They would do so only incidentally; but not more so in principle than by shutting up a trader in gaol for debt, or for contempt of Court, or by closing all shops at eight o'clock at night, or by the exercise of mere police powers, or by giving a public holiday. All these are lawful objects, and if they can be properly adopted they do not become unlawful because they cannot be wholly separated from every other matter, and because they are attended with their inevitable consequences.

I think the Provincial Legislature had the power to annex the right of contract to the right of property in the goods mentioned in a bill of lading, although it does affect trade and commerce. But I do not think the Legislature could have enacted that the consignee or indorsee of bill of lading should have no property in the goods mentioned in it. That would have been an interference with and a control exercised over trade and commerce, and so a regulation of it.

And I think also that the same Act, the 33 Vic., ch. 19, which the Ontario Legislature passed as a general provision affecting property and civil rights, over which it has exclusive jurisdiction, the Dominion Parliament might also have passed as a necessary and convenient matter to be dealt with in the regulation of trade and commerce.

This may seem inconsistent with what I have already said. I think it is not so. A Dominion Act, passed expressly to regulate trade and commerce, would be adjudged to be an Act of that description, if it did just what the Ontario

Legislature has done ; for no statute is ever held to be an excess of power and unconstitutional unless on the clearest proof that it is so. And the Ontario Act, just as it is, not professing to regulate trade, and not doing so but in an incidental manner only, is not, in my opinion, *ultra vires* so long as the statute itself can be, as I think in such a case it can be, supported as dealing only with property and civil rights.

Unquestionably it is very difficult to attempt to draw the line at the exact limit where a regulation of trade begins, or where it ends, or to attempt to separate it from the due execution of those powers which the Provincial Legislatures indisputably possess, and in many cases over the same subjects. The requirement of a stamp on bills of lading on the export of gold was held to be a regulation of trade which the State could not legislate upon : *Almy v. The People of the State of California*, 24 How. 169.

I cannot mention a case nearer the boundary line, or perhaps quite upon it, than the case just referred to, where the two Legislative bodies may legislate with respect to the same subject, and each with equal force and power, and when the subject dealt with may or may not be a regulation of trade, according to which of the two bodies is legislating upon it.

It is said, in 1 *Story* on the Constitution, 4th ed., sec. 447 : "In cases of implied limitations or prohibitions of power, it is not sufficient to shew a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience leading irresistibly to the same conclusion."

It may be also asked, is the Choses in Action Act, 35 Vic., ch. 12, O., a regulation of trade and commerce. Are the Mechanics' Lien Acts of 1873 and 1874 regulations of trade and commerce ? Are the Insurance Acts, 36 Vic., ch. 44, O., and the 38 Vic., ch. 65, O. restricting the companies to certain conditions only, regulations of trade and commerce ? I think they are not. They are supportable as proper subjects of Provincial legislation as property and civil rights, and perhaps also as matters of a merely local or private nature.

The term "commerce" has an almost illimitable signification, according to the different judicial meanings assigned to it.

A tax imposed on Chinese residents in the State was held void as a tax on commerce: *Lin-Sing v. Washburn*, 20 Cal. 534.

A regulation of Pilots and Pilotage is a regulation of commerce: *Cooley v. The Wardens of Port of Philadelphia*, 12 How. 299.

A bridge built over the Ohio River obstructing its navigation is an interference with commerce between several States: *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 578.

A State law imposing a charge on masters of vessels for every passenger brought from a foreign country into the State, is a tax on commerce: *The Passenger Cases*, 7 How. 283.

As to the regulation of commerce, see the *Passenger Cases* 7 Wheat. 283, at pp. 350, 351. It is the power to prescribe the rule by which commerce is to be governed: *Gibbons v. Ogden*, 9 Wheat 196.

In *Lin-Sing v. Washburn*, 20 Cal., p. 570, Mr. Justice Cope said:—

"It was conceded that the States, in the exercise of their police powers, could pass quarantine and health laws, and laws excluding paupers, vagabonds, and criminals * * Such laws are necessary for providing for the general welfare; and although commerce may be incidentally affected by them, they were not regarded as inimical to the exercise of the commercial power. As to how far a State may go in this respect, no opinion was expressed, and it would have been difficult, if not impossible, to lay down any precise or definite rule upon the subject. 'No one,' said Mr. Justice McLean, 'has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has neces-

sarily been observed as applicable to the circumstances of each case.' ”

Under the law as we think it stands with respect to brewers, they may manufacture beer and keep and have and sell it, on paying to the Dominion Government the sum of \$50 for and on obtaining its license so to do under the Inland Revenue Act, and they are not and cannot be subjected to any other license, duty, charge, or tax for manufacturing, keeping, or selling their beer, by any provincial authority. But they cannot sell otherwise than by wholesale under the provisions and restrictions of the Ontario Act of 1874. These restrictions were in force against brewers before and at the time of Confederation, by the Temperance Act of 1864, and they can also, perhaps, be maintained as a mere police regulation.

The case relating to the defendant as a brewer properly ends here, but it may be well to distinguish it from the case of *Re Slavin and the Village of Orillia* (a), which was disposed of in this Court a few days ago, and in which the question was, whether a municipality can lawfully pass a by-law prohibiting the sale of liquors by retail in shops and taverns, and places of that kind—whether in fact the Ontario Legislation on that subject is not unconstitutional? This case was considered partially in connection with that one.

In that case we were of opinion the Ontario Legislature was not wrongfully interfering with trade and commerce by requiring shop and tavern licenses and other licenses of that description to be taken out, and by leaving with or by granting to municipalities the right to prohibit the sale of liquors at shops, taverns, and other places of that kind. It is an interference with trade and commerce, in my opinion,—that is, with our internal business,—but it is an interference which is justified for the reasons partly before given, and others hereafter mentioned. It is also to some extent and in some aspects a regulation of police. Police may be described as Civil Government,

(a) Ante, p. 159.

and is very much the same as public policy, benefit, and convenience, which is a good ground of legal judgment.

In *Potter's Dwaris's Statutes*, p. 444, ch. 14, there is a very good treatise on the police power of a country.

There are many things which are against public policy. To contract in restraint of trade: *Leather Cloth Co. v. Lhorsont*, L. R. 9 Eq. 345, which refers to all the authorities on that subject; or in restraint of marriage: *Lowe v. Peers*. 4 Burr. 2225. To wager on the event of an election of a member to serve in Parliament, or as to the sex of a third person. So the sale of offices, the stifling of public prosecutions, maintenance of suits, and many other cases of the like kind.

A devise in tail to be void if the devisee did not acquire the dignity and title of Duke or Marquis, was held to be against public policy: *Egerton v. Earl Brownlow*, 18 Jur. 71.

The maxim *salus populi suprema lex* expresses much that is contained in the doctrine of public policy, and in which the rights of the individual have to give way to the general good.

As a matter of public policy the authorities may seize unwholesome food which is exposed for sale: *Emmerton v. Mathews*, 7 H. & N. 586, per Channell, B., at page 588; and at page 593 the Chief Baron said: "Any legal point which in the remotest degree bears upon the public health and the general safety of the community is deserving of the fullest consideration."

In *Bosworth v. Hearne*, 2 Str. 1085, a by-law of the city of London, which confined brewers to certain hours for carrying out drink—that is, until not later than one in the afternoon, between Michaelmas and Lady Day, and from thence until not later than eleven in the forenoon,—was held good. The Court said it was only "a regulation of trade, of which the city was the best judge, and it was enough that it (the by-law) did not seem unreasonable."

It was held an unreasonable by-law, that the Mayor of Bury St. Edmunds, who had authority to grant a license to any one to erect a booth for the purpose of any show or

public entertainment in a public place in the Borough at any other time than during the annual fair, should be compelled to revoke it if three inhabitants, householders residing within one hundred yards of the place intended to be used, should memorialise him in writing to revoke it: *Elwood v. Bullock*, 6 Q. B. 383.

In that case Lord Denman, C. J., said, at p. 401: "Mr. Watson argues that this is an enactment of police, and not in restraint of trade; but it is a police regulation executed by restraining trade. That such a regulation effects the purpose contemplated is an argument which may legalize any exercise of power."

Williams, J., said, "This by-law goes to greater length than any rule of policy can warrant. The argument that some regulation of police is carried into effect by it might be urged for preventing the erection of a house."

Coleridge, J., said, at p. 402: "Whether a by-law is for the regulation of trade, or for the purposes of police, it must be reasonable and just."

In *Whitfield v. Lord Le Despencer*, Cowp. 754, 764, Lord Mansfield, C. J., said, "The Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown."

I consider it to be plain that any restraint by imposing a tax for a license to sell spirituous liquors, or any law prohibiting their sale, is an act of interference with and a regulation of trade and commerce, although the act may also be one partly of police or be intended to be one wholly of police. In such a case it would be an act of police which restrained or regulated trade and commerce: *Lin-Sing and Washburn*, 20 Cal. 534.

The line between interference with commerce and regu-

lation of police, is said to be a very dim and shadowy one: *Cooley on Const. Limitation*, 2nd ed., 586.

But I am not of opinion the Act of the Ontario Legislature, which requires a license to be taken out to sell spirituous liquors by shopkeepers, tavernkeepers, and others of that class, or which continues to municipalities the right to prohibit altogether the sale of such liquors by these persons, is void or unconstitutional. And I think so, although the Dominion Government has the absolute power to regulate trade and commerce internal in each Province, as well as the foreign trade and commerce and the trade and commerce between the separate provinces, which is a greater power than is possessed by the United States Government, for the supreme power there does not extend to the internal trade of any of the States of the Union.

And it will be observed, that much of the argument and reasoning in the cases referred to turns upon this very distinction, that the laws of the different States complained of applied to and affected only the internal affairs and trade of the particular State, and not the foreign trade or the trade between State and State.

The Act of the Ontario Legislature in imposing a tax for a license on shop-keepers, and tavern-keepers, and others of the like class, for selling by retail, or for continuing the power to municipalities to prohibit the retail of spirituous liquors, is not in excess of the Provincial power, although I conceive it to be partly a regulation of trade and commerce, because before and at the time of the Confederation of the Provinces the different municipalities in this Province possessed that power and privilege, and it was not taken away or qualified in any way by the Confederation Act. That Act, too, was in fact passed, and must be presumed to have been passed, by the Imperial Government with a full knowledge at the time of the state of our law, which was affected by the Imperial Act, then under consideration, and, among other matters, that part of our law which related and relates to municipal institutions, as they existed at that time, because over

“Municipal Institutions in the Province” *exclusive* power was then conferred by it upon the Provincial Legislature : *Sturgis v. Darell*, 4 H. & N. 622,629 ; *Dwarris on Statutes*, 693 ; *Fitzgerald v. Champneys*, 2 Johns. & H. 31.

And I am of opinion the right to regulate the sale of such liquors by retail, and also the entire prohibition of their sale in any municipality, relates to a matter of a merely local or private nature in the Province, as read in connection with the control which the Ontario Legislature has over municipal institutions. It partakes largely of a police regulation. It affects our own local and material interests, more than it can possibly affect any other interests beyond our boundaries. It must be admitted that it does or may affect the revenue of the Dominion Government ; so far it is not a matter of a *merely* local or private nature. But as to that, under the power of controlling municipal institutions, we do possess the power of diminishing the revenue in that way, if the Provincial Legislature shall see fit to do so.

The general power of the Dominion Government, in the regulation of trade and commerce, is modified, as before stated, by the right to exercise the municipal powers which were possessed at the time of Confederation, and by such others which the Provincial Legislature may confer upon these bodies as reasonable and proper in and for the due fulfilment of their important and manifold functions, and which are not actually repugnant to the newly constituted authority of the Dominion Government.

The effect of it is, that this decision, while it leaves brewers within the special control of the Dominion Government, as they were before the Confederation within the special control of the Government of United Upper and Lower Canada, and not within the control of the municipalities, so in my opinion, so far as it is material in this case, it leaves shop and tavern licenses, and the like, and the power to prohibit the sale by retail of spirituous liquors in this Province by shopkeepers, tavern-keepers, and others of that class, under the control of the Ontario Legislature ; because the Ontario municipalities possessed

such powers before and at the time of the Confederation, and in effect these powers were continued to them, and as a consequence are vested in the Ontario Legislature, which controls these institutions. To hold otherwise would be to decide that the effect of the Confederation Act was to repeal the Municipal Act and the powers which Ontario possessed at the time, while the very Act itself has distinctly conferred exclusive power upon the Ontario Legislature to deal with municipal institutions, which must be to deal with them with the powers, rights, and authorities in full which they then possessed. And these rights and powers can be exercised in the manner, and to the extent, for the reasons before stated, without serious difficulty and without confusion, by the due exercise of the several powers which are respectively vested in the two authorities.

The result of our opinion is, that the 24th and 25th sections of the Ontario Act of 1874, do not in law apply to the defendant as a brewer.

The 25th section of the Act is even more objectionable than the other, for it prevents even the keeping or having for purposes of sale any such liquors, without having first obtained a license, and even although made for foreign exportation.

And that the defendant is entitled to judgment upon demurrer.

This information is based expressly upon the statute referred to, and the thirty-fifth section is the one which contains the penalties. The remedy against the defendant can only be for the penalties which are declared to follow from an infraction of the law. There is for the first offence, which I take this to be, a penalty of not less than \$20 besides costs, and not more than \$50 besides costs. The Crown cannot, therefore, demand any specific penalty, but I do not see why a demand should not be made such as the Crown is entitled to make.

The information should, I think, have averred that the Attorney-General demanded from the defendant the sum of not less than \$20 besides costs, and not more than \$50

besides costs, because that is what in fact must be claimed, and it is all that can be claimed ; and it should properly be averred to be according to the statute in that behalf : *Lee v. Clarke*, 2 East 333.

I think the Crown is not obliged to prosecute under the 44th section, as before mentioned, before two magistrates ; but while the Crown may choose its tribunal, it must pursue its remedy under the statute.

The case has been considered wholly upon the merits, and it was so argued, and if it be desired to carry the matter further, the Attorney-General will have leave to amend the information as against any formal objection there may be to it.

I may add, that if I be permitted to formulate what I have said, it may be stated as follows :

1. The business of a brewer is a branch of trade and commerce.

2. His business, although domestic and internal in the Province in which it is carried on, is under the general control of the Dominion Government, which, unlike the Government of the United States, possesses the general sovereignty of the country, subordinate, of course, to the Imperial Parliament, while the Provinces, unlike the respective States of the Union, can exercise only their delegated powers.

3. The Dominion Parliament has power alone to tax and regulate the trade of a brewer, and having done so, the Ontario Legislature has not the power to restrain it, unless in a qualified manner, and for the purposes of police, to the extent before mentioned.

4. The prohibition to keep, or have for sale, or to sell beer by a brewer, unless under a license, and the payment of a charge or duty for the license, is an excess of power by the provincial authority, and is a restraint and regulation of trade and commerce, and is not the exercise of a police power.

5. The Ontario Legislature has the power to exercise control in all matters of police, or, in other words, which

relate to the good government, health, and morals of the people, within the proper limit of its enumerated powers.

6. It is not altogether quite easy to determine what is a matter of police and what a regulation of trade. The police power is, in almost every case, to some extent, when dealing with persons in trade or with the subjects of trade, a restraint, and in that respect it affects or may be a regulation, of trade.

7. The restriction imposed by the Ontario Legislature on brewers, not to sell by retail, as defined in the Act of 1874, is not *ultra vires*, because it is a repetition and renewal of the legislation which was in force here before and at the time of Confederation.

8. The right conferred on the Ontario Legislature to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses, does not extend to licenses on brewers, over which class of persons the General Government only, and at all times, exercised jurisdiction, and which class is of a different nature from the classes which sell only, and do not manufacture, and who sell by retail and not by wholesale. The words "and other licenses" have reference, as before stated to licenses of a wholly different grade from the Government license to brewers and distillers.

9. The Ontario Legislature has the right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of Confederation the exercise of these powers; and because such power, read in connection with sec. 92, sub-sec. 16 of the Confederation Act, is now a matter of "a merely local or private nature in the province."

10. The power last referred to is in restraint of trade, as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion Parliament, must be considered to be modified by the power which the Ontario Legislature, acting in relation to municipal institutions and to licenses, may properly exercise.

11. The charge on the defendant is not authorized by the power of the Ontario Legislature to impose direct taxation, for the charge is not a direct but an indirect tax.

12. Nor is the charge authorized by the power to deal with property and civil rights, upon a just construction of the 91st and 92nd sections of the Union Act.

The learned Chief Justice and my brother Morrison concur in the conclusions stated at the end of the judgment; but I am not authorized to say they adopt literally the particulars of the opinion I have read.

The judgment will be for the defendant on the demurrer to the information.

Judgment for defendant.

On this judgment the Crown brought error, on the following grounds:—

That the said information and the matters therein contained are sufficient in law, and that the said James Taylor ought not to have been dismissed and discharged by the said Court of Queen's Bench of and from the premises charged upon him in the said information:—that the judgment was given for the said Taylor, to be dismissed and discharged of and from the premises charged upon him in the said information, whereas by law judgment ought to have been given for our said Lady the Queen against the said Taylor, and the said Taylor ought to have been convicted of the offence charged upon him:—that the Legislature of the Province of Ontario had power and authority to pass and make the Act mentioned in the said information, intituled, "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," and the said James Taylor having, as by the record appears, wilfully, and in contravention of the said Act, sold at the Town of St. Catharines, in the County of Lincoln, by wholesale, a large quantity of fermented liquor manufactured by him as a brewer, for consumption within the Province of Ontario, without first having obtained a license as required

by the said Act, was and is guilty of the misdemeanor charged upon him in the said information, and ought to have been convicted thereof by the judgment of the said Court of Queen's Bench.

Joinder in error.

The case was argued in the Court of Error and Appeal, on the 17th and 18th June, 1875 (*a.*)

Crooks, Q. C., and *McKenzie*, Q. C., for the plaintiff in error, and *R. A. Harrison*, Q. C., contra.

The argument and cases cited were substantially the same as before the Queen's Bench, ante, p. 183.

September 25, 1875. DRAPER, C. J., of Appeal.—This case comes before us on a writ of error from a judgment in the Queen's Bench rendered upon an information for penalties against the defendant, for that after the passing of the Act of Ontario, 37 Vic., ch. 32, he, then being a brewer licensed by the Government of Canada, did manufacture, to wit, 1,000 gallons of beer, and in contravention of the said Act of Ontario did sell by wholesale 500 gallons of the beer so manufactured, for consumption in the said Province, without first obtaining a license, as required by the said Act, to sell by wholesale as a brewer. To this information the defendant demurred, and the Court of Queen's Bench gave judgment for the defendant on this demurrer.

The principal error insisted upon by the Attorney General of Ontario was, that the Provincial Legislature had power to pass the Act in question, which, so far as this case is concerned, is as follows:—

Sec. 24. "No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors, within the Province of Ontario without having first obtained a license under this Act authorizing him so to do; provided that this section shall not apply to sales under legal process, or sales by assignees in insolvency."

(a) Present, DRAPER, C. J. of Appeal, STRONG, J., BURTON, J., and PATTERSON, J.

Sec. 25. "No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, fermented or other manufactured liquors, for the purpose of selling, bartering, or trading therein, unless duly licensed thereto under the provisions of this Act."

Sec. 26. "The last two preceding sections shall not prevent any brewer, distiller, or other person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having or selling any liquor manufactured by him in any building wherein such manufacture is carried on, and which building forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorized to be manufactured under such license is sold by retail, or wherein is kept any broken package of such articles: provided, that any such brewer, distiller, or other person is further required to first obtain a license to sell by wholesale under this Act the liquor so manufactured by him, when sold for consumption within this Province, and under which license the said liquor may be sold by sample, or in original packages, in any municipality, as well as in that in which it is manufactured, but so that no such sale shall be in quantities less than those prescribed in section 4 of this Act."

Which section 4 defines a license by wholesale to mean "a license for selling, bartering or trafficking by wholesale only such liquors in warehouses, stores, shops, or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel at any one time; and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

In the judgment appealed from, it is said that the Act

of Ontario must be considered "as well whether it conflicts with the Dominion power of raising money by any mode or system of taxation, as whether it conflicts with the Dominion powers to regulate trade and commerce;" and in another place, "The question now to be determined is, whether there is a conflict between the Ontario statute and the Act of Confederation on the subject before us."

Now, it appears to me that, before entering into that question, it is desirable to obtain a clear understanding of the 91st and 92nd sections.

The power to make laws which is conferred, by the first part of this section, on Her Majesty and the Senate and the House of Commons for the peace, order, and good government of Canada is (substituting "welfare" for "order") a repetition of the language used in the 12th sec. of the 14 Geo. III, ch. 83, and again in the 1st and 2nd sections of 31 Geo. III, ch. 31. But for greater certainty—not to restrict what had just been conferred—it is declared that (notwithstanding this Act), *the exclusive legislative authority* of the Parliament of Canada extends to all matters coming within the classes of enumerated subjects thereafter set forth.

Exclusive of what? Surely not of the subordinate Provincial Legislatures, whose powers had yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more definite or extended renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the New Dominion, than was contained in the Imperial statute 18 Geo. III, ch. 12, and the 28-29 Vic., ch. 63, secs. 3, 4, 5.

In somewhat different terms, by sec. 92, the Legislature of each Province has powers conferred upon it to "exclusively make laws in relation to matters coming within the classes of subjects * * enumerated" in that section.

Now, it appears to me that section 91 does mention some classes of subjects as belonging to the "exclusive legislative authority" of the Parliament of the Dominion, which,

in part at least, form part of matters coming within some class or classes of subjects enumerated in section 92.

For example, the second class of subjects mentioned in sec. 91, is "the regulation of trade and commerce" (two words which, in their present location, appear to me to be almost, if not entirely, synonymous); and next, "the raising of money by *any* mode or *system* of taxation"; while in sec. 92 we find in the enumeration of classes of subjects within the "exclusive powers of Provincial Legislatures." "Direct taxation within the Province in order to the raising of a revenue for provincial purposes;" and "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes," and "Property and civil rights in the Province."

Now it will, in my opinion, be difficult to maintain that the regulation of trade and commerce even alone, and *a multo fortiori* in conjunction with a power to raise money by *any* mode or system of taxation, if *exclusively* vested in the Dominion, are not at variance with powers in the Provincial Legislatures *exclusively* to make laws respecting shop, saloon, tavern, auctioneer, and other licenses, in order to raise a revenue for provincial and other purposes, and to resort to direct taxation for provincial purposes.

As to direct taxation, while there is some difference of expression in defining it, the difference appears to me to be more verbal than substantial.

One writer says a tax "is said to be direct when it is taken immediately from income or capital; and indirect when it is taken from them by making their owners pay for articles on which it has been laid, or for leave to use certain articles, or to exercise certain privileges": *Encyc. Brit.* Title "Taxation."

Another says "Taxes may be either imposed on the income or property of individuals, or on the articles on which those incomes or property are expended. In England the rates of duties on licenses are included under the head excise.

I entertain no doubt that a duty to be paid for a license to brew or to sell beer by wholesale, is an indirect tax.

But it is further contended that the words "shop, saloon, tavern, auctioneer, and other licenses" do not include a license to a brewer to brew beer, or to sell the same by wholesale, and therefore the Ontario Legislature could not lawfully pass an Act to compel a brewer to take out such a license: that the words "other licenses" are limited by the preceding words, and that the maxim *noscitur a sociis* must be applied.

This objection is founded on the rule that "a general word following specific words must be taken to mean something of the same kind;" or, as is elsewhere stated, "when a word of wide signification follows others of a signification less wide, it must be interpreted as having a meaning bringing it within the same class as those others": *Read v. Ingram*, 3 E. & B. at p. 901.

Therefore, "other licenses" means licenses of the same character as those just previously mentioned, viz., shop, saloon, tavern, and auctioneer, which are licenses to carry on a particular business, or to exercise a particular vocation; and it is urged that the licenses thus specified are commonly mentioned with and seem to have an affinity to those licenses which are chiefly contained in the Municipal Act, *ex. gr.* licenses on billiard tables, ordinary houses where fruit, &c., are sold, hucksters, and pedlers, &c.

The affinity in some of these cases seems to me rather remote, and the objection appears to me to be answered by the consideration of the object, "raising a revenue for *Provincial* as well as for local or municipal purposes."

With the sincerest respect for the learned Judge who has put forward this objection, I cannot yield to it. I think we should not look out of the Imperial Act for the *socii*, whose character is to affix a meaning on "other licenses;" and granting that the four named occupations have got into low company in the Ontario Municipal Act, they are lifted out of it in section 92.

To be serious, I do not find in the objection or the illustrations of it any sufficient ground for holding that the license to a brewer, as provided for in the Ontario

Act, is not within the words "other licenses," as used in the Imperial Act. It is quite true that the *business* of a brewer has been generally, perhaps always, dealt with as a matter of excise, but I do not see the inconvenience though there is incongruity between the two provisions, nor that there will any difficulty arise in the brewer's business or his relations with the officers of excise by his being required to take out this provincial license.

We must, however, consider what is the effect of the apparent interference or inconsistency between sections 91 and 92.

Mr. *Dwarris*, at p. 513, states as a rule that the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute, referring to *Magna Charta*, 2 Inst. pp. 20, 30, the 9th branch or clause of which confirms to the Barons of the Cinque Ports "all their liberties and free customs," but these words are restrained by branch or clause 17, which took from them the right to hold pleas of the Crown.

I may here properly apply the language of Best, C. J., in *Churchill v. Crease*, 5 Bing. at p. 180, and say I should have thought the language of sec. 91, *the regulation of trade and commerce*, "conclusive if there had been no conflicting intention to be collected from the Act; but the rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."

This appears to me to settle any question as to inconsistency between the two sections, and to leave the whole question to turn upon the effect of the words *other licenses*. Upon this I have already expressed my opinion.

Assuming this conclusion to be correct in both respects, there is no ground for holding the Act of Ontario, 37 Vic., ch. 32, to be *ultra vires*; and whether it touches several or only one of the classes of subjects enumerated in sec. 91, it does not go beyond the exceptions contained in sec. 92;

and if so, there should be judgment against the defendant on the demurrer.

And this makes it unnecessary to consider and observe upon the American cases that were referred to in the judgment delivered in the Court below, and in the argument before us, because so far as I have seen they do not touch the points on which I rest my decision, as being sustained by English authority.

I cannot forbear adding that I see no inevitable inconvenience to arise from each Government possessing the power of granting a license in this matter. It might certainly be said that the Legislature of Ontario might make an injurious use of it, as by imposing a tax for the license unreasonable in amount, which would prevent the exercise of the trade; but I cannot believe that the most zealous advocate of prohibition, as to spirituous or fermented liquors, would prevail on the Assembly to pass such a law, and if it happened otherwise, the power of disallowance is ample to prevent such an interference with the policy of the Dominion Government. This power would prevent any mischief from hasty or unwise legislation, which could not well be justified as actuated by a desire to "raise a revenue for either provincial, local, or municipal purposes."

I am of opinion the judgment of the Court of Queen's Bench should be reversed, and judgment on the demurrer be entered for the Crown.

STRONG, J.—I entirely concur in the judgment just pronounced by his Lordship the Chief Justice. I only desire to add that I am of opinion that a license which would amount to prohibition would be an undue interference with the exclusive powers of the Dominion Parliament as to trade and commerce, as has been in effect lately decided by the Supreme Court of New Brunswick, in the case of *Regina v. the Justices of the Peace of the County of Kings, Ex parte McManus*, 11 C. L. J. 249, 2 Pugsley 525.

BURTON, J., and PATTERSON, J., concurred.

Appeal allowed.

BRISTOW V. THE CORPORATION OF THE TOWN OF CORNWALL.

*Municipal corporations—Commission to enquire into financial affairs—
Action by commissioners for expenses.*

Sec. 243, of the Municipal Institutions Act of 1866, as amended by 34 Vic. ch. 30, sec. 15, O., authorizes the Governor in Council to issue a commission to enquire into the financial affairs of the corporation, in case thirty duly qualified electors of the municipality petition therefor; and sec. 244 enacts that the expense of the commission shall be determined and certified by the Minister of Finance, and shall then become a debt due to the commissioner by the corporation. In an action by the commissioner for such expenses:

Held, 1. That evidence was properly admitted to shew that the petitioners, who were described only as ratepayers, were electors as well; and, 2. That defendants could not in this action dispute the validity of the commission, by shewing that one of the thirty, though on the electors' roll, was not in fact a duly qualified elector.

Quære, whether, if there had been no petition, the plaintiff could have recovered.

Quære, also, as to how far the roll is conclusive, beyond the right to vote, except for the purpose of an election.

COUNTY COURT case.

Declaration: Special count, stating that the Lieutenant-Governor of this Province, on the 27th March, 1871, did under sec. 243 of the Municipal Act, 1866, issue a commission under the Great Seal of the Province to enquire into the financial affairs of the defendants, and things connected therewith: that the plaintiff was appointed in and by the commission to be commissioner to enquire into the said financial affairs of the defendants and things connected therewith: that before the commission was issued thirty duly qualified electors of the said municipality petitioned the Lieutenant-Governor in council for the commission, and sufficient cause for the commission was shewn: that the plaintiff under and by virtue of the commission made the enquiry thereby directed and executed the commission: that after the commission was executed the expense to be allowed to the plaintiff for executing the commission was determined and certified by the Treasurer of the Province at the sum of \$191.23; and that after the expense was so determined and certified, and more than three calendar months before the commencement of this suit, demand

of the said sum of \$191.23 was made by the plaintiff at the office of the Treasurer of the defendants; yet the said Treasurer did not, nor did the defendants then, or at any time pay the said amount or any part thereof, but the same remains wholly unpaid.

Pleas: 1. That thirty duly qualified electors of the municipality of the Town of Cornwall did not before the issue of the commission petition the Lieutenant-Governor for the said commission.

2. That the Lieutenant-Governor in Council did not issue a commission under the Great Seal of this Province, directed to the plaintiff, to enquire into the financial affairs of the defendants and matters connected therewith, as alleged.

3. That no sufficient cause was shewn as in the declaration mentioned.

Issue.

The cause was tried at Cornwall, before Galt, J., at the Spring Assizes, 1874.

The evidence shewed there were thirty petitioners, and that all were qualified electors but one; but the petition described the signers as ratepayers, not electors.

The learned Judge ruled that evidence was admissible to shew they were electors, but that the person in question was not a duly qualified elector, and consequently there were not thirty duly qualified electors who were petitioners; and he entered a verdict for the defendants, reserving leave to the plaintiff to move to enter the verdict for him if the Court should be of opinion the plaintiff was entitled to recover. The claim was agreed upon to be \$191.23.

In Easter Term, May 21, 1874, *S. Richards*, Q.C., obtained a rule *nisi* calling on the defendants to shew cause why the verdict for the defendants should not be set aside, and a verdict entered for the plaintiff.

In this term, February 3, 1875, *Bethune* shewed cause. A proper petition was a condition precedent to the issuing of the commission. The subscribers to the petition were described

as ratepayers not as electors, and there was on the face of the instrument an application made by persons who were not authorized to make it. Sec. 75 of the Act of 1866, or the substituted section in ch. 52 sec. 75 of the same session, describes who shall be electors, and for the purpose of an election the rating or roll is made absolute and final; but it does not follow that there is any such finality in any other case—for instance, on an application to quash a by-law, or to qualify a person not an elector to sign a petition of this kind. The oath, also, in section 101 sub-sec. 8 of the Municipal Act, 1866, does not preclude the defendants from taking the objection to one of the thirty subscribers not being an elector in fact. The fifth section of the 32 Vic. ch. 21, and the oath number 17 in the schedule of the Act, shews the way the Municipal Act, for the purposes of this commission and the enquiry to be founded upon it, should be construed—that is, that the elector should not be considered as such, although duly appearing on the roll to be one, unless he be in truth the owner of the necessary property qualification which would entitle him to vote. He referred to *The Stormont Election Case*, 7 C. L. J. N. S. 23; *North Victoria Election Case*, 10 C. L. J. N. S. 217, as shewing that the roll is not conclusive as to the persons claiming the right to vote, although it is so as to the amount they are assessed for. And while the Returning Officer may be bound, the Court is not: *Regina ex rel. McVean v. Graham*, 7 U. C. L. J. 125; *Regina v. McGregor*, 19 C. P. 69.

Feb. 6. *S. Richards*, Q. C., supported the rule. The petition is based on sec. 243, of the Act of 1866, and the amendment of it by 34 Vic., ch. 30, sec. 15, O. The commission issues on the sole act of the Lieutenant-Governor when such a petition is sent in. No one is called on to shew cause why it should not issue. The proper way to have avoided it when it had issued was, to have applied to supersede it. The corporation did not do that. They lay by all the time the enquiry was going on, and, after the service was rendered, and the enquiry closed, they object to pay the

expense of it. The evidence was rightly admitted to shew that the subscribers were electors although they were described as ratepayers only. *Taylor* on Ev., 6th ed. 155, 156, shews that in such a case it will be presumed that all was rightly done: See also *Cooper v. Wellbanks*, 14 C. P. 364.

In this action the defendants cannot go behind the commission and dispute its validity. If they can say now that one of the thirty was not an elector because he had not a sufficient property qualification, they may equally say one was not of full age or an alien. The person objected to was entitled to vote, because he was in fact on the electors' roll, and he could have taken the oath prescribed by section 101 of the Act of 1866. If there had been no roll he would have been obliged to swear he was a householder, &c., but he takes no such oath where there is a roll, for the roll is conclusive on the point, and not merely as to the amount the party is rated for.

March 2, 1875. WILSON, J., delivered the judgment of the Court.

We do not think it necessary to labour this case. There were at least thirty subscribers to the petition as required by the statute. They were described in the petition as ratepayers of the municipality. They were shewn to have been in fact, all but one, electors duly qualified to vote, by evidence given at the trial.

The whole thirty were named on the electors' roll, although the one objected to should properly not have been on that roll.

Being named on it he was entitled to vote at municipal elections. The returning officer could not and cannot question his right to vote, because by the 75th section of the Act the rating upon the roll for that purpose is declared to be "absolute and final," and this person could have taken the oath under the 101st section of the same Act at the time of tendering his vote with perfect safety, for he is not required to state that he has any property qualification. The roll is conclusive on that point.

We do not say however that the roll is conclusive for all purposes. It is quite likely that on a motion to quash a by-law the applicant might be shewn, notwithstanding the roll, not to be an elector or ratepayer or person competent to make such a motion.

And whether such a person could maintain an action against the returning officer for rejecting his vote may be a question also.

So to found an enquiry into the financial condition and affairs of a municipality, such as this was, it may be that the right of the petitioners to be electors in fact, even against the face of the roll, was a traversable and enquirable matter.

If the objection had been shewn in due time, it ought to have had its due effect.

But the answer to the objection now being raised is, that it comes up incidentally in an action by the commissioner for his fees certified to him by the statute, and that it is taken after the whole enquiry is closed and the purposes of the commission accomplished, when it might have been taken long before the inquisition was closed.

In *Regina v. Taylor*, 11 A. & E. 949, 954, Lord Denman C. J., said, "To attack a charter granted by the Crown through an officer appointed under it is a new proceeding; and I think we ought not to call upon the officer to defend the act of the Crown in granting the charter. There are other ways in which the objects of this application may be pursued."

In *Regina v. Boucher*, 3 Q. B. 641, the Court refused on a motion to quash a rate to try the validity of a charter, although it had been granted on a petition not by the majority of the inhabitant householders, and although it represented there was a gaol at the time in Birmingham when there was not one.

It is not right to cast upon this plaintiff the burden and responsibility of supporting the validity of the commission of enquiry in a matter of this kind.

If there had been no petition the commission might have

been invalid to give the plaintiff his present cause of action: *Rex v. Thompson*, 3 Price 278.

And as a rule every order made under the authority of a statute must on the face of it shew the authority has been duly exercised, whether by the Lord Chancellor or by a justice of the peace: *Christie v. Unwin*, 11 A. & E. 373.

The fact that the parties were electors as well as rate-payers was properly allowed to be proved at the trial: *Rutter v. Chapman*, 8 M. & W. 1.

We think, for the reasons given, the defendants cannot in this action dispute the validity of the commission by merely shewing that one of the thirty petitioners was not in law entitled to be upon the roll, and should not in fact have been upon it.

The rule will therefore be discharged.

Rule discharged.

LYNAR V. MOSSOP.

Innkeeper—Loss of Goods—Liability.

The plaintiff arrived in Toronto from Ireland, and drove from the railway station to defendant's hotel, having a portmanteau, carpet bag, &c., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, and after occupying it for about an hour went to his friend, with whom he remained. He was furnished with a key for the door but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. The plaintiff said he intended to return that night, but he said nothing of his intention to defendant.

Held, that the plaintiff was not there as a guest after he had dressed and left the inn; and that defendant therefore was not liable as an innkeeper, the portmanteau having been lost after the plaintiff left.

Quære, if defendant had been so liable, whether the plaintiff was not guilty of contributory negligence.

APPEAL from the County Court of the County of York.

Action by the plaintiff as guest against defendant as innkeeper, for the loss of his goods while such guest.

Declaration—First count: assumpsit. Second count: in case. Third count: detinue. Fourth count: trover.

Pleas : 1. To first count : non-assumpsit ; 2. To first count : that the defendant did keep the said goods safely and without diminution and loss.

3. To third count : that the defendant did not detain the goods.

4. To second and fourth counts : not guilty.

5. To first and second counts : that the plaintiff did not as such traveller bring into the inn the said goods, or any of them, nor were the said goods or any of them within the said inn as alleged.

6. To the whole declaration : that the goods were not the plaintiff's, as alleged.

The facts appearing at the trial were, that the plaintiff arrived in Toronto from Ireland on the 12th November, 1873, between 3 and 4 p.m. There was a long delay at the Union Station, and he was driven, about dark, by a cabman to the defendant's hotel. He said he had a portmanteau, carpet bag, leather hat case, and silk umbrella with him, and they were all brought into the hotel. He applied to the clerk for a room, and the clerk entered the plaintiff's name in a book. The plaintiff said, "A room was assigned me to change my dress, and one of the servants preceded me with a lamp. I carried my portmanteau in one hand and my carpet bag in the other to the room. I asked for hot water to shave ; he brought it, and I occupied the room about an hour. I took out what I required and locked up the portmanteau, and left it and the carpet bag in the room. I closed the door after me and came down stairs, and soon after left the house to see a friend. * * I returned to the hotel next morning, and applied to the clerk for my luggage, and he sent the porter for it, who came down bringing a carpet bag and no portmanteau ; he said there was none there. I went with the young man back to the room, and found nothing more there. The servant and I searched several rooms on the flat for it, but could not find it. I mentioned this to defendant and the bookkeeper ; they said no doubt it would be found. Next day I asked if it had been found, and was told it had not. I think the servant left a

key for the room on the stand ; I did not use it ; had two glasses of beer there before leaving."

In cross-examination he said : " I said I only wanted to dress and change my clothes before going to a friend. * * * I intended to have returned and slept at the hotel, and so stated to my friend, (a Captain Daly). My relative (a Mr. Lawlor, of Simcoe-street), insisted on my remaining at his house, and I stayed."

Thomas Lawlor said the plaintiff came to his house that evening at 7 o'clock ; after a time he wanted to return to the hotel, but he, Mr. Lawlor, would not let him. The plaintiff stayed there until the trial. " He intended to reside with us," Mr. Lawlor said.

Thomas Knox, the cabman, said he took the plaintiff and another gentleman and a lady from the station to defendant's hotel on the night stated. He said, " I carried only one valise and trunk and carpet bag and other little things ; next morning I saw the valise up stairs close by some room, and I took it down stairs and put it in my cab for the lady. I am pretty sure it was the same valise I had brought the previous evening. I left the valise and other articles at the baggage room of the Union Station. It was about 6:30 a.m. I drove the man and woman to station."

For the defence it was said the plaintiff, when asked if he wanted a room to stay all night, said " No ; he only wanted a room to wash, that he was not going to stay, and was going to a friend's house."

The learned Judge left it to the jury to say whether the plaintiff came to the defendant's hotel as described by himself and had refreshments, and had brought with him into the hotel his luggage, including the valise, and had been assigned a room, and had occupied it, without having any notice or directions with respect to its use, or as to locking the door on leaving, and had left intending soon to return, and leaving the room with the valise therein, and had then closed the door, and had unexpectedly remained at his friend's till next morning, and had then returned and claimed his valise with the articles in it, and that it was

then lost, and was not forthcoming. And further, whether the plaintiff had been guilty of any negligence in the premises, and whether his return to the hotel under the circumstances was within a reasonable time—if so, to find for the plaintiff; but if all these were not found in his favour, to find for defendant.

No objection was taken to this charge.

The jury found for the plaintiff, and \$92.80 damages.

A rule was granted in the Court below calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered; or why a new trial should not be granted, because the verdict was contrary to law and evidence: that the plaintiff was not a guest, or if he had been he had ceased to be so when he would not take a room and left the house: that the defendant was a mere gratuitous bailee; and the plaintiff was guilty of contributory negligence by not locking the room door.

The rule was after argument discharged, the learned Judge being of opinion—in addition to what has been already quoted as his direction to the jury, which was repeated in discharging the rule—on examining the cases, that the evidence was quite sufficient to sustain the verdict of which he fully approved: and he did not infer from, any of the cases that the facts as left to the jury did not fully sustain the verdict which was rendered.

The defendant appealed from the decision, on the ground that the plaintiff was not a guest; that if he had been, he ceased to be so when he left the hotel; and there was no loss while he was a guest at the hotel.

In this term, Feb. 8, 1875, *McMichael*, Q. C., argued the case for the appellant. He referred to *Bennett v. Mellor*, 5 T. R. 273; *Gelley v. Clerk*, Cro. Jac. 188; *Day v. Bather*, 2 H. & C. 14; *Calye's case*, 1 Sm. L. C., 6th ed., 105; *Smith v. Dearlove*, 6 C. B. 132.

Akers, for the respondent, referred to *Jones v. Tyler*, 1 A. & E. 522; *Thompson v. Lacy*, 3 B. & Al. 283; *Morgan v. Rarey*, 2 F. & F. 283; *Candy v. Spencer*, 3 F. & F. 306.

March, 2, 1875. WILSON, J., delivered the judgment of the Court.

The defendant by his grounds of appeal relies on the fact that the plaintiff was never at any time a guest ; but if he were, that he had ceased to be a guest when he left the hotel, after which time the valise was lost.

I shall take no special notice of the pleadings, because the parties have gone to trial and have argued the case before us as if the whole defence were properly raised upon the record, and because an amendment would be allowed to meet the defence if any amendment were required.

The evidence shews the plaintiff, by engaging the room, and by having refreshment at the inn, was there as a traveller and guest. He arrived here from the old country ; he put up at this inn for a time, just off his journey, and he had accommodation and refreshment there.

There is no doubt of his being a traveller and guest while he was at the inn under these circumstances. The cases are quite clear upon the point.

We think it must be assumed upon the evidence, which went fairly to the jury and with a very correct and impartial direction, that the plaintiff did take the valise in question into the hotel, and up into the room which was assigned to him.

And the only question left to consider is, whether the plaintiff was and continued to be such traveller and guest at the time of the loss of the valise.

He engaged the room as a guest, but only " to dress and change my clothes before going to a friend," as he said. He occupied the room about an hour, and as he was at his friend's about 7 p.m., he must have arrived at the hotel about 6 o'clock. It was near dark, he says, when he got to the hotel, and he required a lamp to enable him to dress.

He left the hotel without saying anything to any one in charge of his desire to keep the room any longer, or of his intention of returning ; but he said he did intend to return and sleep at the hotel that night, and he told that, he says, to his travelling friend, Captain Daly.

The learned Judge left it to the jury to say whether the plaintiff left the hotel "intending soon to return, and had unexpectedly remained at his friend's till next morning," and the jury found he did.

We rather think *his* intention was not of much consequence so long as it was not communicated to the defendant, as it certainly was not, and so long as the defendant had no reason to believe the plaintiff would return.

If the fact be as the plaintiff said: "I applied to the clerk for a room He assigned a room to me to change my dress. I said I only wanted to dress and change my clothes before going to a friend;" and if it be as the book-keeper added further, that the plaintiff said "he was not going to stay," it seems pretty plain that the plaintiff was not a traveller or guest there after he had washed and dressed, and taken refreshment, and left the house about seven o'clock that night; and the valise in the room was lost after that time.

In *Gelley v. Clark*, Cro. Jac. 189, it is said by Williams, J.: "Where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at liberty, and therefore is not a guest during that time."

In *Wintermute v. Clark*, 5 Sandford 242, it was decided that if the guest quit the inn, leaving his baggage behind him, the innkeeper is no longer responsible for its safe keeping unless it is specially committed to his charge, and then only as a common bailee.

On this evidence we think the defendant is not shewn to be liable as an innkeeper.

So far as contributory negligence can be attributed to the plaintiff, no question has been raised upon it in the grounds of appeal if the defendant is to be considered merely as a common bailee.

The facts, if decided upon, would seem to be very much against the plaintiff:—leaving his valise in an unlocked and unoccupied bedroom of an hotel during a whole night while he was absent from it, and not a guest at the house

and while he had been furnished with a key to lock the door, and no notice having been given by him to the landlord whether he intended to return to the house or not, would be strong evidence of contributory negligence,

Such evidence would be admissible against the plaintiff in his claim against the defendant in the character of inn-keeper, and it would apply with more force if the defendant is to be treated as a mere bailee : *Oppenheim v. White Lion Hotel Co., Limited*, L. R. 6 C. P. 515.

The appeal should be allowed, and the order of the Court will be that the rule absolute in the Court below be discharged, and that the defendant's rule *nisi* be made absolute for entering a nonsuit, with costs. No costs of appeal.

Appeal allowed, without costs.

FRANCIS GIBBONEY V. HUGH GIBBONEY.

Verbal lease for five years—Entry under—Tenancy from year to year.

Where the tenant enters under a verbal lease void under the Statute, a tenancy from year to year may be implied though no rent has been paid.

In this case, one R. G. verbally leased a farm to the plaintiff on the 15th of April, 1873, for five years, at \$100 a year. The plaintiff entered on the 17th, cleared 4½ acres, and put in peas and oats, of which the lessor was aware. R. G. died on the 5th September, having devised the land to defendant, who entered in the same month and took the crops which the plaintiff had sown.

Held, that the plaintiff was a tenant from year to year, and that defendant was a trespasser in entering upon him.

TRESPASS to the south west quarter of Lot 17, in the 7th concession of East Gwillimbury.

Pleas: 1. Not guilty. 2. Land not plaintiff's. 3. Land the freehold of defendant.

Issue joined on the first and second pleas.

Replication to the third plea: That previous to the close becoming the freehold of defendant it was the freehold of one Robert Gibboney, now deceased: that Robert Gibboney, while seized of the land, demised it to the plaintiff as tenant for

an unexpired term of years, at a certain annual rent, which demise and tenancy continued in full force and undetermined until at and after the said several times when, &c., by virtue of which demise and tenancy the plaintiff, before the said times when, &c., entered into and upon and became possessed of the said close and lands for the said term and tenancy, and remained so possessed under and by virtue of the said demise and tenancy until the said times when, &c. : that during the said demise and tenancy the said Robert Gibboney died, and before his death he devised his reversion in the said close and lands to the defendant, who thereupon became seized of the said reversion subject to the demise and tenancy of the plaintiff; and that during the demise, tenancy, and reversion of the plaintiff, the defendant committed the said several trespasses in the declaration alleged.

Rejoinder: That Robert Gibboney did verbally agree with the plaintiff that the plaintiff should have the use of the said lands for the purpose of taking thereof one crop, and should be allowed to pasture and feed his cattle thereon until the 21st of March, 1874: that after such verbal agreement it was agreed and understood by and between the plaintiff and Robert Gibboney, that Robert Gibboney should be entitled to till and sow turnip seed upon a certain portion of the said lands, and should be entitled to clear and sow oats upon a certain other portion of the said lands, and should be entitled to go in and upon such portions of the said lands and till the same, and to sow the said oats and turnips, and reap and carry the same away; and in pursuance of such agreement and understanding Robert Gibboney, by and with the leave and consent of the plaintiff, did sow oats and turnips upon certain portions of the lands, and it was by leave and consent of the plaintiff, and under the agreement and understanding aforesaid, that the defendant entered upon the said lands and reaped and carried away the oats sown thereon; and the defendant further says that as the executor of Robert Gibboney he was possessed

of or entitled to the crop of turnips and oats sowed by Robert Gibboney upon the lands, and that he was entitled to enter upon the lands and to reap and carry away the said turnips and oats. Issue.

The cause was tried at the Toronto Spring Assizes, 1874, before Hagarty, C. J. C. P.

It appeared that Robert Gibboney owned the freehold of the land, and that he died on the 5th of September, 1873, having devised the land in question to the defendant. The plaintiff said he rented verbally the land in question on the 15th of April, 1873, from Robert Gibboney for five years at \$100 a year. He entered on the 17th of April, and the rent was to begin from his entry. He put in peas and oats; he cleared four and a half acres, and broke up two and a half acres, and he seeded a part with timothy and clover. Robert Gibboney, the lessor, was present during several days while the plaintiff was at work.

On the 11th of September defendant cut the oats which the plaintiff had sowed, and he ploughed up eight acres of the land, ploughing up peas which the plaintiff had sowed; he prevented plaintiff's cattle going on to the land, and he took away some potatoes. Plaintiff offered to give the place up at the end of the year if paid for his improvements. The plaintiff never paid any rent—there was none due.

The plaintiff put in for Robert Gibboney on the land about half an acre of turnips, and the oats sowed were deceased's oats. It was these oats defendant took.

There was no substantial dispute as to the facts. The question was altogether one of law.

The learned Chief Justice stated to the jury that it was for them to say whether Robert Gibboney demised the land to the plaintiff or not: that if he did, the demise could at most be only a yearly tenancy, and the plaintiff could hold only till April, 1874, when his interest would terminate: that the plaintiff's counsel had urged that the first year's tenancy could not be determined at the end of that year without a previous six months' notice to quit: and that

the defendant, as reversioner, repudiated the lease and entered upon the land in September, which was more than six months before the end of the first year.

The verdict was for the plaintiff, and \$50 damages.

In Easter Term, May 22, 1874, *M. C. Cameron*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, the verdict being contrary to law and evidence, and for misdirection in the learned Chief Justice telling the jury that the plaintiff, under the demise from Robert Gibboney for five years, although it was not in writing or by deed, and no rent was paid, was a tenant for a year, or from year to year, when in fact by said demise the plaintiff only became tenant at will, and the will was determined.

In this Term, Feb. 3, *Robinson*, Q.C., shewed cause. If the plaintiff were only tenant at will he cannot recover against defendant for his mere entry upon the land, because the defendant was at the time under the will of Robert Gibboney the owner of the freehold and reversion. If the plaintiff had paid rent, then he would have been tenant from year to year, or for a year certainly. But the payment of rent is not the only circumstance which will convert a tenancy at will into one of a fixed character, either for a year or from year to year. The lessor saw the plaintiff putting in crops, and from that the jury might infer a tenancy greater than at will merely. The taking of the crops of the plaintiff was not justifiable, and that is a substantive trespass. He cited *Caverhill v. Orvis*, 12 C. P. 392; *Tress v. Savage*, 4 E. & B. 36; *Taylor* on L. and T., 5th ed., sec. 19; *Woodfall* on L. and T., 10th ed., 83, 151, 176-7; *Clayton v. Blakey*, 2 Sm. L. C., 6th ed., 103; *Doidge v. Bowers*, 2 M. & W. 365; *Mulherne v. Fortune*, 8 C. P. 434; *Abbott's N. Y. Digest*, p. 641, No. 5, p. 643, No. 26.

McMichael, Q.C., supported the rule. It was a misdirection to say that the plaintiff was tenant for a year or from

year to year. He was tenant at will only, and Robert Gibboney's death on 5th September, 1873, determined the will. Sec. 1 of the Statute of Frauds and our own statute both shew that the verbal lease for five years was void for all purposes but to create an estate at will. If the plaintiff had at first a tenancy at will, what was there that ever converted it into an estate for a year or for years? The evidence shews nothing which changed it. He cited *Woodfall* L. & T., 10th ed., 184, and cases there collected; *Clayton v. Blakey*, 2 Sm. L. C. 6th ed. 103; *McInnes v. Stinson*, 8 C. P. 34; *Allen v. Walker*, L. R. 5 Ex. 187.

Jones v. Mills, 10 C. B. N. S. 788, was referred to by Richards, C. J.

March 2, 1875, WILSON, J., delivered the judgment of the Court.

It is singular that a question apparently of so elementary a kind should remain in doubt at the present time, as whether an agreement void by the Statute of Frauds, and by our own statute, because assuming to create a demise for five years, operates by the mere entry of the tenant, and before the payment of rent, to make a tenancy at will only, or a tenancy for a year, or from year to year.

The first section of the Statute of Frauds declares that in such a case the demise shall have the force and effect of "leases or estates at will only, and shall not, at law or in equity, be deemed or taken to have any other or greater force or effect."

In *Clayton v. Blakey*, 8 T. R. 3, 2 Sm. L. C. 103, the defendant held for two or three years under a parol demise for twenty-one years. He was sued for double rent for holding over after the expiration of his term and a notice to quit given; the single rent, therefore, may have been paid for the time held before the time to which the notice to quit referred. The Judge, at the trial, ruled that the defendant was a tenant from year to year, and not at will.

Lord Kenyon, C. J., on a motion against the verdict, said: "The direction was right; for such a holding now operates as a tenancy from year to year. The meaning of

the statute was that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year."

See also *Doe dem. Shore v. Porter*, 3 T. R. 13, 16; *Right d. Flower v. Darby*, 1 T. R. 159.

Notwithstanding the Statute of Frauds, the Court has always held interests so created to be not estates at will but for years, after the payment of rent, or from other circumstances shewing the parties had a tenancy for years in contemplation.

It is not disputed by the defendant's counsel that if rent were paid, having relation to a yearly holding, such is the law; but he contends that there can be no such yearly tenancy created where there has been no payment of rent applicable to a yearly holding, and that there has been no payment in this case.

The plaintiff's counsel contends that the yearly holding may be presumed from other circumstances than the payment of rent.

We think the presumption of a yearly tenancy may arise from other causes than from the payment of rent.

The fact that the agreement itself was for five years, is a circumstance from which a yearly holding may be inferred.

The cases to which I have last referred, and the cases of *Richardson v. Langridge*, 4 Taunt. 128; *Tress v. Savage*, 4 E. & B. 36, and *Caverhill v. Orvis*, 12 C. P. 392, support this view.

The entry of the plaintiff was with reference to a yearly holding, and the agreement of the defendant was expressly to that effect.

In 2 Bl. Com. 187, by *Kerr*, 1862, it is said: "But upon the same principle Courts of law have of late years leaned as much as possible against construing demises where no certain time is mentioned to be tenancies at will, but have rather held them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved, in which case they will not suffer either party

to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is generally understood to be six months."

In *Williams' Real Property*, 376, (1873), it is said: "In construction of law, a lease at an annual rent, made generally, without expressly stating it to be an estate at will, and without limiting any certain period, is not a lease at will, but a lease from year to year."

In 1 *Steph. Com.*, 292 (1874), it is said, in addition to what is already quoted from *Blackstone* above: "And if a man is let into possession under a demise not under seal, for a term of more than three years, though such a demise will not pass an interest in the premises for the term intended, yet the lessee will be considered as holding from year to year, and on such of the terms of the agreement as are consistent with that tenancy:" Citing *Lee v. Smith*, 9 Ex. 662; *Tress v. Savage*, 4 E. & B. 36, 42.

In both of these cases rent had been paid, but the result did not turn upon that fact.

In the latter case Coleridge, J., said, at p. 43, in giving judgment: "The party entering into possession under such an instrument is in the same position as that in which he would have been before the Acts. He has not a lease, nor a tenancy for the three years and a week; but a tenancy from year to year."

Nor can there be any difference between the agreement being for an indefinite in place of a definite period. In either case a tenancy is created according to the effect of the contract.

And in the case of a definite time being fixed, the party is tenant from year to year, and the tenancy is determinable at the end of the defined period without notice.

In *Smith on Real and Personal Property*, 3rd ed., 224, it is stated: "It is no longer usual to create tenancies at will by express words; and the Courts lean strongly against implying them, and incline rather to construe demises for uncertain terms or void leases, especially where an annual rent is reserved, as creating tenancies from year to year.

And even where a parol agreement is void under the Statute of Frauds, it is a tenancy from year to year; because, though the statute says it shall be only an estate at will, the meaning of the statute is, that such an agreement shall not operate as a term. See also the note to *Watkins* on Conveyancing, 9th ed., p. 5, 6, 7; 2 *Preston's Abstract of Titles*, 3rd ed., 25.

The case of *Berrey v. Lindley*, 3 M. & G. 498, contains several expressions that it is the *entry* on the terms agreed which determines what the tenancy is.

At p. 512 Coltman, J., says: "A party who enters under an agreement void by the Statute of Frauds becomes by that statute tenant at will to the owner, and the tenancy described in the statute as a tenancy at will has since been construed to enure as a tenancy from year to year."

The reporter in a note adds: "It is believed, however, that no case has decided that a lease for more than three years not reduced into writing shall operate *per se* to create a tenancy from year to year."

In *Bythewood's Conveyancing*, 3rd ed., vol. iv. p. 458, it is said: "What is the nature of the tenancy" (that is, on a void parol demise), "before any such payment of rent has been made, seems to be a debatable point. * * Considering, however, the strong leaning of the Courts in favour of tenancies from year to year, on account of their obvious convenience, as distinguished from tenancies at will simply, it seems to be more probable that a person thus let into possession would be held to be a tenant from year to year; at all events, the tenancy, whatever be its nature, is subject to the terms of the intended demise in all respects except as to its duration."

In *Doe Hull v. Wood*, 14 M. & W. 682, Parke, B., said, p. 687: "*Richardson v. Langridge* (4 Taunt. 128) correctly lays down the law on this subject, viz., that a simple permission to occupy creates a tenancy at will, unless there are circumstances to shew an intention to create a tenancy from year to year, as, for instance, an agreement to pay rent by the quarter or some other aliquot part of a year."

In *Cox v. Bent*, 5 Bing. 185, the admission by plaintiff that the defendant had charged him in account with so much rent was held equivalent to an actual payment, so as to constitute a tenancy from year to year.

The cases of *Braythwayte v. Hitchcock*, 10 M. & W. 494—in which Parke, B., said, at p. 497: “Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year;”—and *Riseley v. Ryle*, 11 M. & W. 16, although expressly to the same effect, are not against the other authorities, for they were cases of agreements for leases and not leases.

In the first case rent had been paid, and a tenancy from year to year was held to have arisen. In the second case no rent had been paid, and a tenancy from year to year was held not to have arisen.

Delivery of possession by a vendor is a sufficient part performance by him to sustain his suit against the purchaser; and acceptance of possession by the purchaser is a sufficient part performance to sustain his suit against the vendor: *Reynolds v. Waring*, Young 346, 351; *Gregory v. Mighell*, 18 Ves. 328; *Mortal v. Lyons*, 8 Ir. Ch. R. 112.

The fact of the purchaser being in possession of the vendor's land without liability to a charge of trespass, shows that some contract has been made between them, and the Court will then receive parol evidence of the contract: *Lester v. Foxcroft*, 1 White & Tudor's L. C., 4th ed., p. 773; *Dale v. Hamilton*, 5 Hare 369, 381; *Morphett v. Jones*, 1 Swanst. 172, 181.

And it is some confirmation of the right being at law a certain interest from year to year in a case of the kind, when in equity the possession of the tenant is a clear act of part performance, upon which specific relief will be given.

The *consensus* of text writers that what was a tenancy at will at the time of the passing of the Statute of Frauds,

when possession is taken under an agreement for a term void by the statute, and rent is reserved, having relation to a yearly holding, is and should be held to be a tenancy from year to year, and the strong leaning of the Courts being in that direction, and the language of the Judges indicating that such is the law, should certainly induce us to concur in so sensible and beneficial a rule.

The rule has been adopted because "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the Courts very early raised an implied contract for a year, and added that the tenancy could not be removed at the end of the year without receiving six months' previous notice : " per Lord Kenyon, C.J., in *Doe d. Shore v. Porter*, 3 T. R. 13, 16.

It may have been assuming very much to decide so in the face of the Statute of Frauds ; but if it is settled law that is enough for us, and we know it is just law.

In this case the plaintiff did in fact enter into possession, not as a tenant at will, but as a tenant at a yearly rent. He became by the agreement and entry a tenant from year to year, his tenancy expiring by efflux of time at the end of five years. Neither party believed that the one who sowed the land was to be driven from it by the mere caprice of the other. The defendant had no right, in our opinion, to enter upon the plaintiff at the time he did. The plaintiff was entitled to a notice to quit, and then he could not have been removed before the proper termination of the year's holding.

A tenancy from year to year is a term taking effect year by year from the beginning of each year : *Gandy v. Jubber*, 10 Jur. N. S. 652 ; *Cattley v. Arnold*, 1 Johns. & H. 651.

The rule will be discharged.

Rule discharged.

OGDEN V. MCARTHUR.

Married Woman's Act, 1873—Conveyance by husband to wife.

A married woman is not enabled by "The Married Woman's Real Estate Act, 1873," 36 Vic. ch. 18, O, to convey land to her husband. The requirement that the husband shall be a party to and execute such deed means that he must be a grantor.

Qæare, as to the effect upon secs. 2, 3, and 4 of C. S. U. C. ch. ch. 85, of the repeal, by 36 Vic. ch. 15, of 34 Vic. ch. 24, which repealed them.

SPECIAL Case.—This action was brought for the recovery of \$1800, payable by the defendant to the plaintiff, under an agreement for the sale (with other lands) of the southerly half, or fifty-two feet, more or less, of lot D, in block number 10, in the Town of Oakville.

The lands were the property of Mary Matilda Ogden, the wife of the plaintiff, and she, by indenture made on the 20th December, 1873, conveyed the said lands in fee to her husband, the plaintiff, for the consideration of one dollar paid to her therefor by her husband.

On or about the first day of June, 1874, Mary Matilda Ogden died intestate, leaving surviving her the plaintiff and two sons respectively of the ages of sixteen and thirteen years.

The question for the opinion of the Court was, did the conveyance aforesaid operate as a conveyance under the Married Woman's Real Estate Act, 1873, to vest the estate of the said Mary Matilda Ogden in the plaintiff?

If the Court were of opinion that the conveyance was operative to pass the estate in the land to the plaintiff, judgment was to be entered for the plaintiff. If, on the other hand, the Court were of opinion that the estate did not pass, judgment was to be entered for the defendant.

In Trinity Term, September 2, 1874, *Appelbe* argued the case for the plaintiff. The plaintiff's wife owned the lands before the passing of 36 Vic. ch. 18, O, and she made the deed

after the passing of the Act. She could make an effective conveyance to her husband of the land, because she has by that statute the same rights with respect to her property as a *feme sole*. It was not required that she should have been examined as to her willingness to dispose of her property.

Hoyles, contra. Such a statute as the one mentioned has always been looked upon with jealousy, and has been interpreted in that spirit. It effects, or purports to effect, a violent change of the common law in that respect. The husband and wife were considered as one person by the common law, so that the two could never be opposing contracting parties, and as a consequence, a conveyance could not legally be made direct by the one to the other.

By reason of the peculiar formalities of a fine the wife could convey to the husband, and by the special jurisdiction of the Court of Chancery she can dispose of her separate estate. This conveyance however must take effect under our statute or not at all. This land was not what is known as separate estate in equity, and when the wife made the deed of it she was not dealing with separate estate. And it is said there is no analogy in a married woman's separate estate in equity to that which she has in her own right at law.

The Consol. Stat. U. C., ch. 73, enables a married woman to deal with her own property to a certain extent, and so also the 34 Vic., ch. 24, O, and 35 Vic., ch. 16, O. The Consol. Stat. U. C., ch. 85, prescribed the formalities to be observed by her when she conveyed her real estate.

The case of *McGuire v. McGuire*, 23 C. P. 123, shews that the wife cannot sue her husband in trover for goods she leaves in the house merely because she has left the house; and *Kramer v. Gless*, 10 C. P. 470, shews that the object of the first Act which was passed was much narrower than the plaintiff contends for under the later Act; but all the statutes on the subject should be read as one.

March 2, 1875, WILSON, J., delivered the judgment of the Court.

We presume the intention of the Legislature was to maintain the repeal of sections 2, 3, and 4 of Consol. Stat. U. C., ch. 85, which were repealed by the 34 Vic., ch. 24, O., which substituted other sections for them.

If that be so, when the 34 Vic., ch. 24, secs. 1, 2, 3, 4, and 5.—the repealing Act—was itself repealed by the 36 Vic., ch. 18, sec. 14, it would have been advisable to have enacted that the repeal of the repealing Act should not revive the original provisions which had been repealed.

There is nothing inconsistent in the original second, third, and fourth sections of ch. 85 standing together with the fourth section of 36 Vic., ch. 18, because the power conferred by this last section on the Judge to make an order dispensing with the husband's concurrence in the wife's conveyance is to be made in those cases in which the husband either cannot join, or cannot conveniently join—that is, there must be a special "cause for so doing"—while the sections of ch. 85 may still stand in full force in all other cases where the husband can join, and is willing to join, or there is no reason to believe he would refuse to concur if it were reasonable he should do so.

The form of the Judge's order given in section 5 of the Act is more comprehensive in its terms than is the enactment which confers the power. The Judge is empowered to make an order in certain specified cases—"or if there be in the opinion of the Judge any other cause for so doing." There must be a cause for his so doing. Although the "other cause" is very indefinite, still the order cannot be made in every case.

And the order, without specifying the cause, simply states that the Judge has made it under the statute, and that the married woman may convey or appoint an attorney to convey for her as a *feme sole*.

We think the 36 Vic., ch. 18, sec. 4, does not, by means of the Judge's order, supply or supersede the provisions of Consol. Stat. U. C., ch. 85, before mentioned. It is a supplement to or amendment of them.

Then as to the third section of the Act of 1873, that section enables a married woman of the age of twenty-one to convey by deed as if she were a *feme sole*, but it declares that "unless hereinafter otherwise provided," (and that reference has no application in this case,) no such conveyance shall be valid or effectual unless the husband is a party to and executes the deed.

If the sections before mentioned of Consol. Stat. U. C., ch. 85, are revived, it is very plain that the husband must be, with his wife, one of the grantors. And if they are not in force, and if this deed is to be judged only by the 36 Vic., ch. 18, the husband must nevertheless be "a party to and execute the deed by which the same (the sale) shall be effected." And in my opinion that also means, in connection with the general law on the subject, that he must be a grantor.

The general rule, that husband and wife are one person in law, and that the one cannot contract with or convey to the other, must apply, excepting in so far as it has been altered.

Very great changes have been made with respect to the rights, powers, and status of married women in many respects, but as regards the conveyance of the wife's real estate the old rule must be held to prevail.

The husband's joinder or concurrence in the act is required for the wife's protection.

If it be allowed that he is sufficiently a party to the deed by being the grantee of his wife, and by executing the deed, then he and his wife are in adverse interests, and she has no protection from imposition or improvidence.

The scope of sections 3, 4, and 5, of this Act are based upon the presumption that the husband, when he does join his wife in executing the deed conveying her lands, is to be a grantor—a concurring party in a sale to another.

It would be absurd for the Judge, by an order, to empower the wife to convey, as a *feme sole*, to her own husband.

In any view of the case the husband cannot be the

grantee of his own wife in any conveyance which she makes of her land as the law now stands.

It is not necessary to consider any of the cases to which we were referred.

The rights and powers of married women are not yet as plainly defined as they ought to be. A single statute consolidating and declaring the law would be of great service.

The question put must be answered in the negative, and judgment must be for the defendant.

Judgment for defendant.

GALLIVAN V. O'DONNELL.

Ejectment—Proof of heirship and identity of parties.

In ejectment the plaintiff claimed title through the heirs-at-law of P. A witness testified that in 1871 he called at the house of P., who was a retired merchant, in London, England, but did not see him, as he was unwell; that afterwards, in 1872, he was told by members of the family there, representing themselves to be P.'s only brothers and sisters, that P. had died on the 20th May, 1872, intestate, and without children; and that hereceived from one of them the deeds for the lot, which were produced, four in number including the patent. A deed to the plaintiff's grantor was put in, executed by all these parties in presence of this witness, who stated that he was satisfied they were P.'s heirs-at-law, and that he had searched at Doctor's Commons for P.'s will, but found none. It was objected that there was no sufficient evidence of heirship, but the learned Judge, who tried the case without a jury, found a verdict for the plaintiff; and the defendant shewing no pretence of title the Court refused to interfere on this ground.

There was no proof of identity of the different grantors and grantees in the deeds shewing the chain of title except the similarity of names, and the possession of the patent and deeds. *Held*, clearly sufficient.

EJECTMENT. The plaintiff claimed title by deed from one Jarvis, who derived title under the grantee from the Crown, the premises in question being the west half of the north half of lot 29 in the 11th concession of Mara; and he called on defendant, by notice under the statute, to shew at the trial what title defendant had.

The defendant claimed title by deed from John and Daniel O'Donnell, who derived title under the grantee of the Crown. His notice of claim did not deny title in the plaintiff.

The evidence on the part of the plaintiff was as follows: Patent to George Wager of the whole lot, dated 7th August, 1829; deed from George Wager to Allan Munro, 31st August, 1832; Allan Munro to John Gordon McKenzie, 26th October, 1840; McKenzie to Robert Spier, for the north half of this lot, 17th April, 1843; Spier to Joseph Proctor, 9th February, 1846, for the north half. The execution of this latter deed was proved at the trial.

The trial took place before WILSON, J., without a jury, at the last Whitby Assizes.

Mr. *Hector Cameron* was examined as a witness. He testified that he received all the deeds, excepting the copy of the one last mentioned, from John Proctor, of England, a brother of Joseph Proctor, the grantee in Spier's deed; and he produced a deed, dated 19th September, 1872, from John Proctor, James Proctor, Daniel Proctor, John Mann, and Mary Mann, surviving brothers and sister of Joseph Proctor, who died intestate, to Edgar J. Jarvis, for the north half of 29. This deed was executed by all the parties in the presence of Mr. Cameron. Mr. Cameron stated he was satisfied they were the heirs-at-law; and he also proved a deed from Jarvis to the plaintiff.

On cross-examination he said that he did not know Joseph Proctor personally: that he had called in 1871 at his house at Finchley, New Road, London, England, but did not see him, as he was unwell—he was a retired merchant: that his brothers and sister who executed the deed were all over sixty years of age: that he knew of the death of Joseph Proctor from the members of the family, and who represented themselves to be the intestate's brothers and sister: that one of them produced all the deeds put in, as well as correspondence between one of the brothers, John, and the firm of Harrison, Osler & Moss here, respecting the lot: that the parties, from their style of living, were respectable people: that he was told by Joseph's family—his brothers and sister—that Joseph had no children: that he died on the 20th May, 1872: that he made no will; and that they, the parties, were his only brothers and sister: that he searched at Doctor's Commons, and found no will registered.

An office copy of a Bill in Chancery, filed by defendant against the plaintiff and Jarvis, was put in, which the learned Judge ruled was inadmissible.

When the plaintiff closed his case it was objected on the part of the defendant that there was no proof that John Proctor and the others were the heirs-at-law of Joseph Proctor, the grantee of Spier, and no proof that Allan Munro, who conveyed to McKenzie, was the person who got the deed from Wager, or that McKenzie, who got the deed from Munro, was the same person who conveyed to Spier, or that Spier who got the deed from McKenzie was the same person who conveyed to Proctor, or that the latter was the same person whom John Proctor and the others professed to represent; and that there was no evidence that Joseph Proctor died intestate, nor evidence of heirship.

The learned Judge overruled all the objections, and he was further of opinion that on defendant's notice, notwithstanding the appearance, the plaintiff was not bound to prove title at all, his title not being denied; and he entered a verdict for the plaintiff.

During Michaelmas Term, November 22, 1873, *Harrison*, Q.C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit or verdict for the defendant, on the ground that the verdict was against law and evidence, and that there was not sufficient legal evidence to warrant a verdict for the plaintiff.

During Trinity Term, Sept. 1, 1874, *Hector Cameron*, Q.C., shewed cause. There is sufficient proof of identity of the parties executing as the heirs of Joseph Proctor. They dealt with the land as the heirs, and lived in the same place as their deceased brother, and represented themselves to be his brothers and sisters, and they produce the title deeds. The defendant has no merits, and does not pretend to any. On the notice the plaintiff need not prove title. He cited *Wallbridge v. Jones*, 33 U. C. R. 613; *Doe d. Magher v. Chisholm*, Dra. 216; *Taylor Ev.*, 6th ed., secs. 571, 576.

Osler, contra. The defendant having entered an appearance, the plaintiff must prove title, except where the Judge casts upon the defendant the burden of shewing his title under sec. 17 of the Ejectment Act: *Campbell v. White*, 24 U. C. R. 120; *Shore v. McCabe*, 10 C. P. 26. [WILSON, J., If you appear only, you deny the plaintiff's title, but if you appear and give notice of title, not denying the plaintiff's title, is the plaintiff bound to prove his title?] There is no legal evidence of the death of Joseph Proctor; the only way in which the plaintiff claims to know of the death is through the statements of the parties who convey to him. He cited *Butler v. Viscount Mountgarret*, 7 H. L. Cas. 633; *Davis v. VanNorman*, 30 U. C. R. 437; *Thompson v. Hall*, 31 U. C. R. 367; *Monkton v. Attorney-General*, 2 Russ. & M. 147; *Hubback on Succession*, 660; *Edwards v. Harvey*, G. Cooper, 39.

March 2, 1875, MORRISON, J., delivered the judgment of the Court.

As to the objection taken, of want of proof of the execution of the deeds under which the plaintiff claims. The conveyances prior to that of Spier to Joseph Proctor, being all over thirty years old, and coming from the custody where it was reasonable to expect they would be, prove themselves. The other conveyances were proved on the trial.

Then as to evidence of the identity of the several grantors down to Joseph Proctor, his death and intestacy, and that the parties who conveyed to Jarvis were the heirs of Joseph Proctor. If there is any evidence upon these several points we should not disturb the verdict, as there is no pretence to title on the part of the defendant, and there is no reason to question the plaintiff's title.

As to the identity of the various grantors, as said by Sir John Robinson, in *Nicholson v. Burkholder*, 21 U. C. R. 108, 111, when similar objections were taken: "This objection of want of proof of identity has formerly, in some cases, been allowed to embarrass the administration of

justice very inconveniently, when every thing was in fact right, and where there was no reason whatever for suspecting that there was any attempt to impose upon the jury. But it is an objection that is now altogether discountenanced, unless the evidence affords some reason for questioning the identity, and where there is positively nothing but the name to go by. The case of *Sewell v. Evans*, 4 Q. B. 626, shews that some decisions which had before taken place maintaining this objection of want of proof of identity, are not now permitted to govern."

And he refers to the strong fact that the patent in that case appeared to have been handed down from one to the other accompanying the several conveyances, as something more for the jury than the identity of names. As said by Patteson, J., in *Sewell v. Evans*, above cited, at p. 634: "The execution of a deed has always been proved by mere evidence of the subscribing witness's handwriting, if he was dead."

In *Hubbard v. Lees et al.*, L. R. 1 Ex. 255, where the question was heirship, a number of certificates of births, baptisms, marriages, and burials were produced from parish registries, and were objected to on the ground that there was no evidence of the identity of the persons therein with the persons of the same name who occurred in the plaintiff's line of proof. The Court, in granting a rule on other points, refused it on the objection as to the certificates, saying that the question of identity was entirely for the jury, and that they would not allow any doubt to be raised on the point.

We also refer to *Brown v. Livingstone*, 29 U. C. R. 520.

As to Joseph Proctor and his heirs. Mr. Cameron proved that he was in 1872 at his residence, Finchley, New Road, London, England, where he lived as a retired merchant: that he was then unable to see him, as he was unwell: that afterwards he was told by members of the family that he died on the 21st May, 1872, without issue and intestate: that he searched at Doctor's Commons for the will, but found none: that he found and received the patent, and all

the conveyances from the patentee to Joseph Proctor, from the members of the family, who executed the deed to Jarvis, and who represented themselves to be brothers and sister of Joseph Proctor, and who were all persons over sixty years of age ; and that they executed the deed in his presence as the heirs of Joseph Proctor ; and Mr. Cameron stated generally he was satisfied that they were the persons and heirs they represented themselves to be.

Now, it seems to us that these parties bearing the same family name, and living in the same place with the deceased Joseph Proctor, and being in possession of the title deeds from the patent to the intestate, and reputed as his brothers and sister, and dealing with the land as such is some, although slight, evidence they are the persons they appear and represent themselves to be. And as the learned Judge, who tried the cause without a jury, found for the plaintiff, we ought not to disturb his finding and order a new trial, particularly in the absence of any affidavit shewing or any pretence that the defendant has any right to retain possession, and in the absence of any suggestion that the plaintiff is not entitled to succeed.

The rule will be discharged.

. *Rule discharged.*

BARNED'S BANKING CO., LIMITED, v. REYNOLDS.

*"The (English) Companies Act, 1862"—Order thereunder making calls—
Right of action on such order here—Defences available thereto—
Liability as past or present member—Pleading.*

An action will lie in this country, on an order made under "The Companies Act, 1862," in England, in the winding up of a company, making a call upon defendant in respect of his shares, and directing payment thereof to one of the two official liquidators appointed; and such action may be brought in the name of the company.

The statute enacts that such order, subject to the provisions in the Act contained for appealing against it, shall be conclusive evidence that the moneys thereby ordered to be paid are due; and that all other pertinent matters stated in such order shall be taken to be truly stated, &c. *Held*, that the provision for appeal did not prevent the order from being final so long as it remained unaltered, and that an allegation that the order was still in force sufficiently negatived an appeal.

Held, also, unnecessary to allege in the declaration that the shares were not paid up, or that defendant was a member when the call was made.

A plea alleging that the order was not final, but could be varied, rescinded, or set aside, was held good; and a replication thereto, that by the Act there could be no appeal from the order except on notice given within three weeks after it had been made, and that no such notice was given, was also held good.

The statute makes the liability a debt, "in England and Ireland of the nature of a specialty:" *Held*, that this did not make it a specialty debt in this country; and that pleas of never indebted, and that the debt did not accrue within six years, were therefore good.

Held, also, that under our Act 23 Vic. ch. 24, the order, notwithstanding the enactment above mentioned, was not conclusive, but that defendant might plead to this action on the order any defence which he might have set up to the original proceedings. Pleas, denying, 1. That defendant was the holder of shares or a member of the company; 2. That the company was unable to pay its debts; 3. That the Court making the order was of opinion that the company should be wound up; and pleas setting up that defendant was only a past member, and that the call was made in respect of debts contracted after he ceased to be a member—that the existing members were able to satisfy the contributions required—and that no amount was unpaid on the shares—were therefore held good.

Held, also, that the general averment that all things happened, &c., necessary to render defendant liable to pay and entitle the plaintiff to maintain this action, sufficiently alleged, if defendant could be considered as being charged as a past member, that the Court was of opinion the present members were unable to pay, and that the call was a debt accrued before defendant ceased to be a member. But,

Held, also, that the declaration charging him *as a member*, must be construed as charging him as a present member: that a plea shewing him to be a past member only was a traverse of his being a member as alleged; and that there would be a variance therefore if such plea were proved.

DEMURRER. Declaration: That by a law or Act of Parliament of the United Kingdom of Great Britain and Ireland, called "The Companies Act, 1862," (25 & 26 Vic. ch.

89,) it was, and is, amongst other things, enacted as follows :—

“ 6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an Incorporated Company, with or without limited liability.”

“ 7. The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.”

“ 38. In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say) : * *

“ (4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, *unpaid* on the shares in respect of which he is liable as a present or past member :”

“ 74. The term ‘contributory’ shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up: it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.”

“ 75. The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland, of the nature of a specialty) accruing due

from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made, as hereinafter mentioned, for enforcing such liability" * *

"79. A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances (that is to say):"— * *

"(4). Whenever a company is unable to pay its debts."

"(5). Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

"80. A company under this Act shall be deemed to be unable to pay its debts." * *

"(4). Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

"81. The expression "The Court," as used in this part of this Act, shall mean the following authorities (that is to say): * *

"In the case of a company registered in England that is not engaged in working any such mine as aforesaid," (*i. e.*, a mine within, and subject to the jurisdiction of the Stannaries): "the High Court of Chancery."

"83. Any Judge of the High Court of Chancery may do in Chambers any act which the Court is hereby authorized to do." * *

"92. For the purpose of conducting proceedings in winding up a company, and assisting the Court therein, there may be appointed a person or persons, to be called an Official Liquidator, or Official Liquidators; and the Court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of Official Liquidator or Official Liquidators; in all cases if more persons than one are appointed to the office of Official Liquidator, the Court shall declare whether any act hereby required or authorized to be done by the Official Liquidator is to be done by all, or any one or more of such persons." * *

"98. As soon as may be, after making an order for winding up the company, the Court shall settle a list of con-

tributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities."

"102. The Court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves." * *

"106. Any order made by the Court in pursuance of this Act, upon any contributory, shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the moneys, if any, thereby appearing to be due, or ordered to be paid, are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings against the real estate of any deceased contributory, in which case such order shall only be *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made."

That the plaintiffs are a company duly incorporated and registered in England under the said Act, and limited by shares; and the defendant was the holder of 100 shares in the capital stock of the said company, and was in respect of those shares a member of the said company, and liable to contribute to its assets, in the event of its being wound up. And the said company became unable to pay its debts, and thereupon such proceedings were had in the High Court of Chancery in England before the Master of the Rolls, one of the Judges of that Court, that it was proved to the satisfaction of the said Court that the said company

was unable to pay its debts, and the said Court was of opinion that it was just and equitable that the said company should be wound up, and an order was duly made by the said Court for the winding up of the said company by the said Court; and all things happened, and were done, necessary to make the said order valid under the said Act; and by other orders of the said Court, Harmood Walcot Banner, and John Young, were duly appointed Official Liquidators of the said company; and by another order of the said Court, made as soon as might be after the making of the said order for winding up of the said company, the said Court duly settled the list of contributories to the assets of the said company, and thereby declared the defendant to be, and settled him on the said list as a contributory in respect of the said 100 shares as a member or contributory in his own right, and as included in the list of contributories, on the 6th day of December, 1867. And afterwards, by an order duly made on the 2nd July, A.D. 1870, by the said Court, the said Court made a call upon the defendant of £33 stg. per share, in respect of 50 of the said shares for which the defendant had been so settled on the list of contributories, and a call of £39 10s. stg. per share in respect of the other 50 of the said shares, and ordered that the defendant should, on or before the 9th September, 1870, or within 24 days after the service of the said order, pay the said sum of £3,625 to the said Harmood Walcot Banner, of 26 North John street, Liverpool, in the county of Lancaster, one of the said Official Liquidators, such sum being, and being by the said order declared to be, the amount due from the defendant in respect of the said calls of £33 per share, and £39 10s. per share; and the said order was, before the said 9th September, duly served upon the defendant, and the said Act of Parliament, or law, during all the time aforesaid, was and still is in force, and was and is the law of England; and all things happened and were done, and all times elapsed necessary to render the defendant liable to pay the said sum of money, and to entitle the plaintiffs to maintain this action for the non-payment

thereof; and said sum of money is equal to the sum of \$17,642 of lawful money of Canada; yet the defendant hath not paid the same. And the plaintiffs claim \$30,000.

Pleas.—1. Never indebted. 2. That the alleged cause of action did not accrue within six years before this suit.

5. That defendant was not the holder of the said 100 shares, nor any or either of them, nor was he in respect of them, or any or either of them, or otherwise a member of the said company, or liable to contribute to its assets in case of its being wound up as alleged.

6. That the said company did not become unable to pay its debts, nor was it proved to the satisfaction of the said Court of Chancery that the said company was unable to pay its debts, nor was the Court of opinion that it was just and equitable that the said company should be wound up as alleged.

10. That in and by the 38th section of the said alleged Act of Parliament, and which section is particularly set forth in the said declaration, it was and is enacted as follows, that is to say:—

“In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say):

1. “No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up.”

2. “No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.”

3. “No past member shall be liable to contribute to the assets of the company unless it appears to the Court that

the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

4. "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

And that in and by the 84th section of the said Act it was and is enacted as follows, that is to say :—

"A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for winding up."

That the said 38th and 84th sections, and the enactments therein respectively contained, and above in this plea set forth, have at all times since the passing of the said Act continued to be, and still are in force, and during all the times aforesaid were and still are the law of England; and the defendant, long before the alleged order was made for winding up the said company, and long before the presentation of the petition for said winding up, ceased to be a member of the said company, and was not at the time of its making of the said order or presenting of said petition, or at any time since, a present or existing member of the said company within the meaning of the said enactments hereinbefore set forth; but during all the times aforesaid was, and still is only a past member of the said company.

11. The defendant repeats the several allegations contained in the tenth plea, and says that they are respectively true in substance and fact, and that the said alleged calls in the declaration mentioned were made as and for contribution by the defendant for or in respect only of debts or liabilities of the said company contracted after the time at which the defendant ceased to be a member of the said company as aforesaid, and not as a contribution for or in respect of any other liability, cause, matter, or thing whatsoever.

12. The defendant repeats the several allegations contained in the tenth plea, and says that they are respec-

tively true in substance and fact, and that before and at the time of the presenting of the petition for the said winding up of the said company, and before and at the time of the making of the said order for winding up of the said company, and from thence hitherto, there were, and still are, existing members of the said company, who were and are holders of the said shares in the declaration mentioned; and the said existing members were, at and during all the times aforesaid, and still are, able to satisfy the contributions required to be made by them in pursuance of the said Act, and it did not appear to the said Court of Chancery that the said existing members, or any of them, were unable to satisfy the said contributions.

13. The defendant repeats the several allegations contained in the tenth plea, and says that they are respectively true in substance and in fact, and that before, or at the time of the making of the said alleged calls, or at any time since, no amount was unpaid on the said shares, or any of them in the declaration mentioned.

16. That under and according to the law of England, in force at the time of the making of the said alleged order by which the said Court of Chancery made the said calls, and ordered payment as therein mentioned, and from thence hitherto and still in force, the said order was not nor is final, but can, under the said law, be varied, rescinded, or set aside by the said Court.

Demurrer to the declaration, on the grounds, that it does not shew any facts or circumstances which, under the laws in force in this Province, give the plaintiffs any right of action against the defendant: that it does not shew that under the alleged Act of Parliament, or under the law of England, the plaintiffs have any right of action against the defendant; and that it appears by said declaration that the said company of the said plaintiffs is being wound up by the High Court of Chancery, and under the authority of the alleged Act of Parliament; and the plaintiffs are not shewn to have nor have they power to sue or bring an action for any call made by the said Court: that it is not shewn

that any call was made on the alleged shares before said order for winding up was made, or that the defendant was the holder of said shares, or any of them, at the time of making any such call, or at the time of the making of the said call in the declaration mentioned, or that the defendants ever became indebted to the plaintiffs upon or in respect of the said shares, or any of them : that it does not shew any amount remained unpaid on said shares, or any of them, at the time of making said alleged call, or that there was any liability for payment of any part thereof : that it appears that after an order has been made for winding up, all power in regard to collecting or getting in the assets of the said company is vested in the said Court of Chancery, which is specially appointed the tribunal with special powers for that purpose, and the alleged liability of the defendant can be enforced only by or through the said Court.

Joinder.

Demurrer to the first plea, on the grounds, that the declaration is a special and not an indebitatus count, and founded upon a specialty, and that the said plea is inapplicable, and inappropriate, and no answer thereto.

Demurrer to the second plea, on the grounds, that the debt sued for is shewn by the declaration to be a specialty debt, and therefore the limitation of six years is inapplicable.

Demurrer to the fifth plea, on the grounds, that the defendant having been found to be liable to contribute by the order in that behalf, mentioned in the declaration, is not at liberty to deny that he was a member, and liable to contribute.

Demurrer to the sixth plea, on the grounds, that the matters therein pleaded have been adjudicated and determined by the orders mentioned in the declaration.

Demurrer to the tenth plea, on the ground, that it is no answer to the said declaration.

Demurrer to the eleventh, twelfth, and thirteenth pleas, on the grounds : that by sections 98 and 106 of the Act,

set out in the declaration, the orders made by the Court of Chancery, and mentioned in the declaration, are conclusive as to the defendant's liability.

Demurrer to the sixteenth plea, on the grounds, that the facts pleaded do not constitute any defence without averments that the order has been varied, rescinded or set aside.

Joinders in demurrer to 1st, 2nd, 5th, 6th, 10th, 11th, 12th, 13th, and 16th pleas.

Replication to the sixteenth plea, that in and by the said Companies' Act, 1862, it was and is enacted as follows:

"Section 124. Rehearings of, and appeals from any order or decision made or given in the matter of the winding up of a company by any Court having jurisdiction under this Act, may be had in the same manner, and subject to the same conditions on and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in the manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal * * *."

And the plaintiffs say that no notice of rehearing, or of appeal from the said order in the said plea mentioned and referred to, was given within three weeks after the said order had been made, nor was the time for giving such notice extended by the Court of Appeal.

Demurrer to the replication to the sixteenth plea, on the grounds, that the allegations in said replication are not inconsistent with the facts set out in said plea, and do not constitute a sufficient answer thereto.

Joinder.

In Michaelmas term, November 30, 1874, *Robinson*, Q.C., with him *Lockhart Gordon*, argued the case for the plaintiffs. The defendant, by demurring to the declaration, contends

that the plaintiffs have no cause of action against him : firstly, because the order of the Court of Chancery directing him to pay the money demanded, founded upon the proceedings set out, is not the subject of an action, and does not give a cause of action at law ; secondly, because the plaintiffs, if an action can be sustained, are not the proper persons to sue ; thirdly, because it is not shewn that any call was made on the shares before the order for winding-up was made ; and because for different other reasons assigned the defendant is not liable to be sued by any one ; and, fourthly, because the defendant, if liable at all, is only liable in and to the process of the Court of Chancery.

The rule is, that if an order, final in its nature, be made by a Court of competent jurisdiction—say for the payment of money, as in this case—it may be enforced in any country, otherwise there would be a failure of justice : *Henley v. Soper*, 8 B. & C. 16 ; *Patrick v. Shedden*, 2 E. & B. 14 ; *Russell v. Smyth*, 9 M. & W. 810 ; *Gauthier v. Routh*, 6 O. S. 602 ; *Tarleton v. Tarleton*, 4 M. & S. 20. Many other cases are collected in *Fisher's Dig.*, “ Action and Suit.” vol. 1, p. 33.

The effect of this order on the defendant to pay the sum demanded created an obligation upon him to pay, and that is a good case of action against him. The 106th section of the Act makes the order conclusive evidence (subject to appeal) that the money ordered to be paid is due. See also the treatises on “ The Companies Act, 1862,” in *Lindley* on Part., 3rd ed., vol. i. 584.

The defendant contends that under sec. 106 the order to pay is shewn not to have been a final order ; but that is not so : the order may be appealed against, and on appeal it may be altered or rescinded, but that does not make the order not final so long as it stands.

The plaintiffs in their replication to the sixteenth plea specially set out the 124th section, which states how appeals may be made and what may be done upon them, but that section leaves the declaration unaffected, for it

still appears the order was final while not appealed from and while unaltered, and neither appeal nor alteration is shewn.

As to the general right to bring an action when no other remedy is available, see *Little v. Ince*, 3 C. P. 528; *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584; *The Municipal Council of the County of Wellington v. The Municipality of the Township of Wilmot*, 17 U. C. R. 82; *Murray v. Dawson*, 17 C. P. 588; *The President, Directors, and Company of Bronté Harbour v. White*, 23 C. P. 164; *McGiverin v. James*, 33 U. C. R. 203; *Lindley on Part.*, 3rd ed. 1303.

It is then, secondly, contended by the defendant that the order, although final, will not help the plaintiffs, because they are not the proper persons to sue upon it. The sections of the Act applicable are section 92 and section 95, sub-secs. 1-7, and the cases shew that the company may bring the action, and that the liquidators sue only when the Court directs them to do so: *Turquand v. Kirby*, L. R. 4 Eq., 123; *The United Ports and General Insurance Co. v. Hill*, L. R. 5 Q. B. 395; *In re Barned's Banking Co., Ex parte Contract Corporation*, L. R. 2 Ch. 350; *In re Contract Corporation—Gooch's case*, L. R. 7 Ch. 207; *Lindley on Part.*, 3rd ed., 1334.

Then as to the pleas to which the plaintiffs have demurred, the first plea of never indebted is bad if this be a specialty debt, but if it be not a specialty debt the plea is warranted by *Welland R. W. Co. v. Blake*, 6 H. & N. 410; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222; *Edinburgh, Leith, and Newhaven R. W. Co. v. Hebblewhite*, 6 M. & W. 707; and *Patrick v. Shëdden*, E. & B. 14. But sec. 75 makes this a specialty debt, and the plea is therefore bad.

The second plea must be bad for the same reason, because the limitation in cases of debt by specialty is longer than six years.

The 5th, 6th, 11th, 12th, and 13th pleas depend, and

perhaps the 16th plea also, upon the conclusiveness or effect of the order, and that depends chiefly upon sec. 106. If the order be not conclusive, the plaintiffs will have to prove every one of the allegations in the declaration by some other means than by the proof and production of the order. If this order be considered as a foreign judgment or decree, the pleas may, since our Act 23 Vic. ch. 24, which makes foreign judgments enquirable into, contrary to the ordinary rule of international law, be pleadable. On this point, see *Clark v. Mullick*, 3 Moore's P. C. 253; *Attorney-General v. Great Northern R. W. Co.*, 29 L. J. Ch. 794, 1 Dr. & Sm. 154; *Colman v. Eastern Counties R. W. Co.*, 10 Beav. 1. But the order should not be regarded only as a foreign judgment. The Companies Act is made by the statute a part of the constitution of all partnerships formed under it. The parties who become members of a company, or form a company, under the Act, must be considered as agreeing with each other to this section 106, among the other provisions of the statute. It would be unjust if it were otherwise, for the defendant, by removing to a foreign country, might put the company to very expensive proof of various proceedings which they might be unable to procure, and should they fail in such proof the defendant would escape, and the other members be subject to an increased liability, contrary to the terms upon which they and the defendant became members.

The tenth plea shews only that the defendant was a past member of the company, and it shews nothing else.

The 16th plea, as before stated in answering the demurrer to the declaration, is objectionable because the order to pay is not made not final simply because it may be appealed from and varied on appeal: *Scott v. Pilkington*, 2 B. & S. 11; *Griffith v. Ward*, 20 U. C. R. 31.

The replication shews that the plea is in every way insufficient, for it shews the order must be appealed against within a limited time, and that the time had expired before suit, without any appeal.

Cherry v. Thompson, L. R. 7 Q. B. 573, 577; *Green v. Lewis*, 26 U. C. R. 618; *Gibson v. Holland*, L. R. 1 C. P. 1-8; *Waydell v. Provincial Insurance Co.*, 21 U. C. R. 612; *The General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Story's Conflict of Laws*, 4th ed., sec. 557; *Lindley on Part.*, 3rd ed. 1469-1470, appendix 1515 to 1518, were also referred to.

S. Richards, Q. C., contra. The plaintiffs suing under a foreign law must shew a right to sue. The declaration shews no right in them to maintain the action.

The 75th section of the Act makes the debt against a contributory of the like nature as a specialty, but it does not say to whom the debt is owing, whether to the creditors, or to the liquidators, or to the company.

There are two kinds of members, those who were members at the time of the failure and those who had formerly been members but were not members at the time of the failure. As a matter of fact the defendant had ceased to be a member for nine months; but the declaration does not shew whether the defendant was a past member or not: *Morris's Case*, L. R. 8 Ch., 804, 807. A past member is not liable as on a contract, but by virtue of the statute.

The debt claimed here is due to the liquidators: Sec. 75. There is nothing to shew any liability to the plaintiffs. They did not make the calls which they now sue for, nor had the power to do so. and they cannot be entitled to sue for them. The statute has created a particular tribunal with special remedies, and relief in such a case must be sought for only under the Act and in the place where it is in force. This is not a common law proceeding—the corporation was liable only at common law, and not the members of it. It is by the special law the members are made liable, past as well as present members; and proceedings taken to enforce its provisions can only be taken under it and in accordance with it: *Stevens v. Evans*, 2 Burr. 1152-1157; *Dundalk Western R. W. Co. v. Tapster*,

1 Q. B. 667; *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milvain*, 5 Ex. 61; *Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Cox on Joint Stock Companies*, 7th ed., 148; *Ex parte Gibbons, Re Clarke*, 11 L. T. N. S. 752; *Ex parte Harding, Re Williams*, 10 L. T. N. S. 117; *Ex parte Canwell, Re Vaughan*, 10 L. T. N. S. 316; *Turquand v. Kirby*, L. R. 4 Eq. 123.

When a specific remedy is given by an Act in a colony, that remedy can only be pursued there and not out of it; *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717.

This order is not to be considered a final judgment any more than a County Court judgment in England, which is not final, but may be altered and made payable by instalments or otherwise as the Judge may afterwards direct: *Berkeley v. Elderkin*, 1 E. & B. 805. These powers of the County Court Judge are special statutory provisions, and the parties are therefore confined to the remedies provided by the statute, and a judgment of that Court cannot be sued upon in any other Court: *Ibid.* The like rule applies to Division Court judgments in this Province: *McPherson v. Forrester*, 11 U. C. R. 362; *Donnelly v. Stewart*, 25 U. C. R. 398. See also *Story's Conflict of Laws*, 7th ed., secs. 267, 569, 525a; *Erickson v. Nesmith*, 15 Gray, 221; *Erickson v. Nesmith*, 4 Allen, 233.

An action will not lie on orders of the Court of Chancery unless they are final: *Smith v. Whalley*, 2 B. & P. 482; *Emerson v. Lashley*, 2 H. Bl. 248; *Berkeley v. Elderkin*, 1 E. & B. 805; *Patrick v. Shedden*, 2 E. & B. 14; *Sheehy v. Professional Life Assurance Co.*, 2 C. B. N. S. 211.

In *Carpenter v. Thornton*, 3 B. & A. 52, it was held an action would not lie on a decree in equity for the payment of a sum of money certain.

In *Henley v. Soper*, 8 B. & C. 16 the same doctrine was laid down. In *Henderson v. Henderson*, 6 Q. B. 288, the Court gave effect to a colonial equitable decree.

Then, as to the pleas, the first plea is good: *Philpott v. Adams*, 7 H. & N. 888, 890.

The second plea is also good. The order may be a specialty by statute in England, but it is not a specialty here; the limitation of six years therefore is a bar: *Welland R. W. Co. v. Blake*, 6 H. & N. 410; *Harris v. Quine*, L. R. 4 Q. B. 653; *Story's Conflict of Laws*, 7th ed., sec. 558; *Bank of United States v. Donnally*, 8 Peters 361-370; *Adam v. Kerr*, 1 B. & P. 360; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Huber v. Steiner*, 2 Bing. N. C. 202.

As to the fifth plea, the defendant is not precluded from pleading it in this country, and the estoppel is the only objection made to it: *Story's Conflict of Laws*, 7th ed., 634 a, 635; *Bain v. Proprietors of the Whitehaven and Furness Junction R. W. Co.* 3 H. L. 19; *Yates v. Thompson*, 3 Cl. & Fin. 544; *Christian v. Gibson*, 3 Moore's P. C. 351.

The 6th, 11th, 12th and 13th pleas are supported in the same manner.

The further cases of *Hesketh v. Ward*, 17 C. P. 190; *Manning v. Thompson*, 17 C. P. 606; *Waydell v. Provincial Insurance Co.*, 21 U. C. R. 612, are referred to as decisions here in actions on foreign judgments.

The tenth plea shews the defendant was a past member, and therefore only liable as such, and the necessary averments to make him liable as a past member should have been made.

The 16th plea shews the order sued upon is not final. The replication to it alleges that it may be altered or rescinded on appeal, and no appeal has been made. If it is final when there has been no appeal against it, the replication may be sufficient.

This case generally shews a state of facts on the whole record which is against natural justice—a recovery against a person absent at the time and knowing nothing of the proceedings: *Schibsby v. Westenholz*, L. R. 6 Q. B. 155.

March 6th, 1875, WILSON, J., delivered the judgment of the Court.

There are several questions of some importance presented in this case:—

1. Is the defendant subject to an action in this country for the money demanded at the instance of any one? Or, to vary it, does the English statute create a domestic tribunal, confined to England alone, for the adjudication of all matters which arise in the course of a winding-up proceeding carried on in the Courts there, under the Companies' Act of 1862?

If the suit cannot be prosecuted here for calls made, the defendant must get judgment, although he may be liable to the specific statutory remedies under the Act at the suit of somebody.

If the defendant is liable to be proceeded against in this country for the money demanded; then,

2. To whom is he liable to be sued, or who should be the plaintiffs in the action? Is he liable to the corporation, the present plaintiffs, or to the liquidators? If to the liquidators, this action fails, unless an amendment can be made. If to the corporation, then

3. Have the plaintiffs stated their cause of action sufficiently? If they have not, they must fail, unless an amendment be made. If they have, then

4. Are the pleas, or any of them, well pleaded? If they are not, the plaintiffs will be entitled to judgment against such of them as are not well pleaded. If they are, judgment will be for the defendant.

It has also to be considered whether the replication is sufficient in law, in case the sixteenth plea be held to be a good plea. The different pleas must also be disposed of separately as against the objections which have been taken to them.

These objections are chiefly, whether the claim sued upon is a specialty, or a simple contract demand—whether the order to pay is final or not—whether it is in the nature of an estoppel to preclude the defendant from pleading many of his pleas or not.

The decision of this case depends principally upon the English "Companies Act, 1862,"—that is, upon such parts of it which the parties have pleaded, as we are not at liberty

to look at any other parts of it than those they have set out. It is not a statute which has operation in this country, and it is, although an Imperial statute, as much a foreign law here as if it were the Legislative Act of the United States or of France.

First, then, can an action upon or under the Companies Act, be sustained in this country for the claim made against the defendant?

If this is to be considered as a judgment or in the nature of a judgment or decree finding a specific sum of money to be due by the defendant, and ordering him to pay it, and if it be not an interlocutory proceeding, which may be varied by the Court, according to circumstances, but a final determination of the demand, not open or subject to special equitable considerations, it may be sued upon in this country.

The defendant will be liable here because it is just and reasonable he should pay whatever he is, by the order of a foreign Court, directed and liable to pay; and that order we are required, by the law of comity, to give effect to by opening our Courts to help and facilitate its recovery, unless there be something contrary to reason and natural justice in the demand, or something repugnant and self-destructive in the order, decree, judgment, or proceeding which is or may be the basis of action here.

The fact that the foreign Court has mistaken the law of another country in the judgment pronounced will not necessarily affect the judgment when sued upon in the country whose law has been mistaken, because the law of that other country is a matter of fact, and has to be proved as a fact in the country where the original proceedings were being carried on. And if the defendant in that suit did not bring to the Court the knowledge of what the foreign law was, he has omitted a matter which, like any other fact not proved which he might have proved in his defence, he cannot complain of; and such judgment rightly given upon the facts which were before the Court is a valid and binding judgment, although there might

have been a wholly different judgment pronounced if the full and correct state of the foreign law had been duly proved.

A judgment also which may be reversed or altered on appeal, or in error, or by other proceeding of the like nature, is a final and conclusive judgment so long as it stands unreversed or unaltered on appeal or otherwise.

These matters do not necessarily form a part of the enquiry in determining the first question, whether there is any remedy in this country upon the present winding-up order, made under the special statute in England, because that question assumes for the present that the winding-up order is to be treated as a final and valid decree or judgment against the defendant; it presents for consideration the mere fact whether the Companies Act has not established a purely domestic tribunal, with a procedure and remedies adapted only to the country where the litigation originated, and in which it is carried on, and for which the statute was specially passed.

Still it is necessary to state the general rules and principles which govern the Courts of one country in giving effect to the judgments and decrees of another country, because they may help us in determining whether the English statute is one of the nature contended for by the defendant, and whether the order made, however binding there, can or cannot be enforced in any other country.

I am now dealing only with the declaration, and not with any matters which are brought forward by the pleas.

The declaration shews that a company under the Act may be wound up by the Court, whenever it is unable to pay its debts, and whenever the Court is of opinion that it is right and equitable that the company should be wound up: sec. 79, sub-secs. 4, 5:

That on being wound up past and present members are to be liable to contribute to the assets of the company, and the costs, charges, and expenses of winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves: sec. 38:

That in *limited* companies no member shall be liable to contribute more than is unpaid upon his shares: *ibid.* sub-sec. 4:

That a *contributory* means every person liable to contribute to the assets of the company: sec. 74:

That official liquidators may be appointed by the Court of Chancery for the purpose of conducting proceedings in winding-up a company, and assisting the Court therein: sec. 92.

That the Court may, at any time after making an order for winding up, and either before or after it has ascertained the sufficiency of assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of the liability for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves: sec. 102.

And that any order made by the Court on any contributory shall, subject to the right of appeal, be conclusive evidence that the moneys ordered to be paid are due; and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings against the real estate of any deceased contributory: sec. 106.

That the plaintiffs' Company was ordered to be wound up: that the defendant held one hundred shares in it: that official liquidators were appointed: that the Court settled the list of contributories to the assets, and put the defendant on the list as a member and contributory for the one hundred shares:

That by a certain order calls were made on the members and contributories, and upon defendant as one of them, for certain sums of money, which were ordered to be paid on certain days past, to one of the liquidators, of No. 26 North John street, Liverpool, England.

That the defendant's amount was £3,625 sterling, and that the order was duly served on the defendant, but he did not, and has not paid the money.

Is there anything which the declaration discloses to prevent this money being sued for here as so much money due by and decreed to be paid by the defendant?

Is the remedy for the recovery of this money confined to England, where the proceedings originated and were carried on?

We do not think there is anything to prevent the recovery of the money from the defendant. It is the money of the Company. The liquidator is to assist the Court in winding up the business of the Company which is in Court. There are clauses of the Act which we are not at liberty to notice on this demurrer, because they have not been set out, which enable summary proceedings to be taken against a defaulting contributory in Ireland and Scotland. If we could notice that provision it would not determine the general right we have to deal with, because in the case of proceedings in those countries it is a certain specified remedy which is given: section 122. Section 95 also, if we could look at it, permits the liquidator to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the Company.

It will be necessary to refer to such authorities as I have examined, which may help us in settling the question. They are cases which apply specially to this statute.

Turquand v. Kirby, L. R. 4 Eq. 123, shews that a bill may be filed on behalf of the Company in the name of the liquidator.

The Master of the Rolls said, at p. 128: "In all such cases (*i.e.*, to get in the property before winding-up order is made), he must sue in the name of the Company, and where the Company is sued he must defend in the name of the Company; but where, in the course of winding up, he endeavors to get from a contributory the amount of his contribution, in those cases the official liquidator may sue also with the sanction of the Court."

That suit was in England, and so far does not apply directly to this case.

The debt of a member under the Act is to be considered as falling due at the time he entered into the contract,—that is, at the time he became a member. That was so held in the case of bankruptcy of a non-trader, in determining whether the debtor there owed this debt at the time of the passing of the Act which enabled non-traders to be made bankrupt, that statute applying only to such debts which were contracted after that Act.

But the like rule, I presume, will apply to all contributories under the Companies Act: *Ex parte Canwell, Re Vaughan*, 10 Jur. N. S. 480, 10 L. T. N. S. 316.

In *Re Oriental Inland Steam Co., Ex parte Scinde R. W. Co.*, L. R. 9 Ch. 557, the facts were, that on the 8th of November, 1867, the Oriental Company was ordered to be wound up in England under the statute. On the 12th of March, 1868, the Scinde Company came in under the order and proved their debt. On the 28th of January, 1869, the Scinde Company, under a judgment they had obtained against the Oriental Company in England, attached certain property in India of the Oriental Company. On the 4th of March, 1869, by an order made in the winding up, the Scinde Company was ordered to withdraw the attachment without prejudice to any question; and upon the Scinde Company undertaking to abide by any order of the Court the official liquidator was ordered, out of the proceeds of the sale of property in India belonging to the Oriental Company, to pay to the Scinde Company the amount then due to them. The attachment was withdrawn and the money paid to the Scinde Company. The official liquidator applied for an order on the Scinde Company to re-pay the money, and Malins, V. C., made an order to that effect. Both Companies had their chief places of business in England, but carried on business in India.

In appeal, James, L. J., said, at p. 558: "It is not immaterial to observe that there could now be no possibility, having regard to the decision of the Supreme Court of

Calcutta in *Bank of Hindustan v. Premchand*, 5 Bomb. H. C. Rep. 83, which we must take to be quite right, of treating this case as if there were an auxiliary winding-up in India. * * *

"The English Act of Parliament has enacted that in the case of a winding up the assets of the Company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the Company clearly trust property. * * * It has ceased to be beneficially property of the Company; and, being so, it has ceased to be liable to be seized by the execution creditors of the Company. There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court, or take the same view of the law as the Courts of this country have taken as to the proper mode of dealing with such Companies, and also with such assets. If so, we must submit to these difficulties when they occur. * * The assets must be distributed in England upon the footing of equality."

Mellish, L. J., said, at p. 560: "Of course, Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts, unless they are expressly mentioned. Still, that appears to me not to prevent the general application to this case of the principles which have been established in cases of bankruptcy. * * The beneficial interest is clearly taken out of the Company. * * Then it is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding up was presented, or possibly prior to the time when the winding up order was made, * * then the trust for the benefit of the creditors would have been subject to that charge. * * That charge (by the attachment) is subsequent to the creation of the trust, and is made by the particular appellants here with full notice of the trust.

The consequence necessarily follows, that in this Court these creditors cannot be allowed by such means to obtain priority."

It is quite plain that the Lords Justices, from the whole tenor of their judgment, assume that the trust property in such a case would be preserved for and secured to the beneficiaries of it by the Courts of a foreign country, for the purpose of an equal distribution in England, or perhaps in the foreign country, if there are Courts in such country capable of taking cognizance of the rights arising from and connected with trusts on the general application of the principles which have been established in cases of bankruptcy.

The powers of the foreign Court could be exercised only upon and by reason of the English statute which created such new and altered rights.

If the property of the company can be regarded and dealt with by the Courts of a foreign country for the general interest of the creditors, and be preserved from the seizure and application by any particular creditor for his own exclusive use, to the prejudice of all others who should share in it equally with himself, and I see no reason why such foreign Court should not afford its aid for that purpose, what is there to prevent the foreign Court from aiding in the recovery of the debt due to the company, whether that debt be by reason of money lent or goods sold to the debtor, or by reason of calls due by him as a member?

I see no reason why that may not be done, and upon well established authority and principle.

The aid afforded in such a case is "on the ground of morality and justice. The maxim of the English law is to amplify its remedies, and without usurping jurisdiction, to apply its rules to the advancement of substantial justice. Foreign judgments are enforced in these Courts, because the parties liable are bound in duty to satisfy them:" Per Lord Abinger in *Russell v. Smyth*, 9 M. & W. 810, at p. 818.

In the same case, p. 819, Parke, B., said: "Where the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." The other Judges concurred.

The same doctrine is repeated in *Williams v. Jones*, 13 M. & W. 628, at pp. 633, 634, and confirmed in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155. It is placed rather on the ground just stated, as Mr. Justice Blackburn expressly mentions, than on what he says "is loosely called 'comity.'"

And it is of no consequence upon what liability the original decree or judgment was founded, whether upon a merely equitable condition of things or otherwise. It is sufficient that the decree or judgment pronounced has been given for the payment of a specific sum of money to be made by the debtor. When that has been done, a new duty and obligation arise, and it is this new liability which is enforceable in the foreign country, where otherwise there would be a failure of justice: *Henley v. Soper*, 8 B. & C. 16; *Smith v. Whalley*, 2 B. & P. 482; *Henderson v. Henderson*, 6 Q. B. 288.

And in *Alivon v. Furnival*, 4 Tyr. 751, 771, it is said by Parke, B., "This is a peculiar right of action created by the law of that country, (France), and we think it may, by the comity of nations, be enforced in this as much as the right of foreign assignees or foreign corporations appointed or created in a different way from that which the law of this country requires."

It was argued that this was a case which came within the principle that when the statute creates a right or liability and gives a remedy, the statutory and specific remedy can alone be taken—by arbitration, by proceeding before justices by distress or otherwise, as the case may be. That rule is subject to some exceptions. It firstly depends upon whether the remedy given is cumulative or exclusive, and, secondly, whether the remedy is co-extensive with the right or duty.

The case of *Dundalk Western R. W. Co. v. Tapster*, 1

Q. B. 667, is one of the cases relied on to support the argument. There the Act provided that if calls were not paid it should be lawful to sue for them in any of the Queen's Courts in Dublin; and it was held that the remedy was confined to the Irish Courts, and that an action did not lie in any of the English Courts.

The *Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477, decided that a charge for paving a street must be enforced before two justices, as pointed out in the Act.

And at p. 485 Willes, J., said, *Dundalk Western R. W. Co. v. Tapster*, 1 Q. B. 667, had been somewhat doubted.

For special reasons—because the Judge of a County Court may alter his judgment and make the debt payable by instalments or otherwise, as he may see fit, and because certain property is exempt from seizure in the County Court, and because there is no imprisonment excepting by way of punishment, and because the Court was intended to save expensive legal proceedings—it was held that a County Court judgment could not be sued upon in the Superior Courts: *Berkeley v. Elderkin*, 1 E. & B. 805.

And the like ruling was followed here as to actions on Division Court judgments: *McPherson v. Forrester*, 11 U. C. R. 362; *Donnelly v. Stewart*, 25 U. C. R. 398.

Murray v. Dawson, 17 C. P. 588, was also another case, where the party was held bound to follow the remedy pointed out by the Fence Viewers Act.

Shepherd v. Hills, 11 Ex. 55, was a case where the remedy was not co-extensive with the duty, and it was held an action lay. See *Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477, at p. 483, per Willes, J.; *Little v. Ince*, 3 C. P. 528; *President, Directors and Company of the Bronte Harbour v. White*, 23 C. P. 164, which are to the same effect.

It is certainly the rule that an action will not lie on a Judge's order to pay money, nor on any order to pay costs, but that the special remedies in such cases must be adopted, by proceeding by execution, or by attachment or

otherwise, according to the practice of the Court : *Sheehy v. Professional Life Assurance Co.*, 2 C. B. N. S. 211, 256 ; *Dent v. Basham*, 9 Ex. 469 ; *Hookpayton v. Bussell*, 10 Ex. 24 ; *Fry v. Malcolm*, 4 Taunt. 705 ; *Emerson v. Lushley*, 2 H. Bl. 248.

It may be assumed, from the nature of the proceedings, that if the creditors were satisfied and the members desired it, the suit could at any time before it was ended be abandoned, and the company be allowed to resume their business ; and in fact such a course may be taken : *In re South Barrule Slate Quarry Co.*, L. R. 8 Eq. 688.

But that will not prevent the order or decree of the Court for calls being final, so long as a stop has not been put to the proceedings, for the same course may be taken in an action at law. If the demand be paid proceedings will be stayed, but if they be not stayed and judgment be obtained the judgment is final, although it also may be stayed and may be ordered to be set off or be otherwise equitably dealt with by the Court in which it is recorded.

So the Court of Chancery in England may, if there be a statute in force to that effect, order the calls to be made payable specially by instalments at different stated periods, instead of in one sum ; and there is such a statute as that in force : *Re Imperial Mercantile Credit Association Limited*, *Lewis's case*, 28 L. T. N. S. 396, 42 L. J. Chy. 379.

But that will not prevent the decree ordering the payment of calls from operating as a final order for the payment of one specific sum, so long as it stands in that form.

The Court may have the power to direct the party to be examined as to his means of paying the calls, and to commit him to custody by way of punishment if he do not appear to be examined, or if he decline to answer the questions put to him ; and the foreign Court may have no such power to deal with him.

Or the original Court may not have the power to imprison by way of execution, and the foreign Court may ;

but neither of these is any sufficient reason why the creditor, because he cannot have all the remedies in the foreign Court which he had in the original Court, or because he has other and different remedies there, should not be allowed to enforce his claim by such means as are open to him in the foreign Court.

The reasons for not permitting a judgment of an inferior Court being sued upon in the Superior Court of the same country cannot apply where the judgment of such inferior Court is sued upon in a foreign country, for in the latter case if the remedy be not afforded there will be a denial of redress and of comity, and a wrong and injustice done, upon the fanciful ground that if the debtor were at the seat of the original Court he might be more favourably dealt with. No doubt that is a good cause for confining proceedings in and to the original Court when the debtor is in the country, the seat of the Court, but it is not a convincing reason for denying relief to a creditor when the debtor has gone to a foreign country and is setting up an inequitable and unjust plea against the claim upon him to pay his honest debt.

We do not think there is anything whatever in any of the cases which have been mentioned, nor in any of the rules or principles which they lay down, which is against the maintenance of an action in this country for the calls in question.

We have only to repeat that we are considering the declaration by itself, and what it discloses, upon and against the legal exceptions which have been taken to it; and we are of opinion the first question must be answered in favour of the plaintiffs.

The second question is, whether the action should be brought by the plaintiffs, the Company, or by the official liquidators named in the declaration.

The order by which the money was directed to be paid requires payment to be made to H. W. Banner, one of the official liquidators, and not to the other, nor to the Company.

An order directing payment to be made to the credit of a cause, does not constitute the plaintiff in that suit a judgment creditor of the defendant under 1 & 2 Vic., ch. 110: *Ward v. Shakeshaft*, 8 W. R. 335; see *Ex parte Thomas*, 9 C. B. 740.

And where the official liquidator desires to issue a *fi. fa.* for non-payment by a contributory, he should get the order to have the payment made to himself according to the rules of the Court, and not merely made to the credit of the official liquidator in a bank: *In re Leeds Banking Co.*, L. R. 1 Ch. 150.

As all proceedings for winding-up are in fact partnership suits, and the official liquidator is the receiver and manager of the assets, and an accountant to make up the books and accounts, he is not liable to be treated otherwise; and therefore, unless he is a litigating party, he cannot be called on to make a discovery. He is bound, as representing all the creditors and standing impartially between them, to give them all the information he is possessed of which they may desire: *In re Contract Corporation, Gooch's case*, L. R. 7 Ch. 207.

It is not at all certain that proceedings upon the order in the name of the company could not be taken, although the payment is to be made to one of the liquidators. The order is made in the partnership suit, and it directs payment to be made to one who represents the company. It is in substance, although not in form, a payment to be made to the company.

If a payment had been directed to be made to the treasurer or other officer of a company, that would be equivalent to an order to pay the company.

The demand for payment would be good if it were made by the person named in the order, but it may be that process—we do not say positively of attachment for contempt against the person, but process against the goods of the debtor—might be issued in the name of the company, although their officer was the person named to receive the money.

There may be some difference between an order of that nature and of an ordinary written contract, upon which an action at law may be maintained.

In general, although there is a writing by one engaging to pay so much money to another, the action may be brought by a third person upon the contract, if the consideration move from him.

As, if one give a writing to pay the rent of certain tolls which he had hired "to the treasurer of the commissioners,"—the tolls having been let by the commissioners—that is a contract to pay the commissioners through the medium of their treasurer: *Pigott v. Thompson*, 3 B. & P. 147.

And where one addressed a letter to the plaintiffs' attorney, asking for indulgence to the defendant till a certain day, and added,—“when I undertake to see *you* paid,”—Held that the action was rightly brought by the creditor, and not by the attorney: *Bortermyn v. Phillips*, 15 East 272.

See also *Evans v. Evans*, 3 A. & E. 132; *Place v. Dalegal*, 4 Bing. N. C. 426.

In some cases either the principal or agent may sue on such a contract, or be sued upon it. The agent may sue in respect of his privity, and the principal in respect of his interest: *Sykes v. Giles*, 5 M. & W. 645, 651, per Lord Abinger; *Higgins v. Senior*, 8 M. & W. 834; *Fisher v. Marsh*, 11 Jur. N. S. 795; S. C. 6 B. & S. 411.

The liquidator, it has been seen, is the officer of the Court, in the character of a receiver and manager. He is not like an assignee in bankruptcy, as the estate does not vest in him: *Re the London Cotton Co.*, L. R. 2 Eq. 53.

The legal estate still remains in the company: *In re Oriental Inland Steam Co., Ex parte Scinde R. W. Co.*, L. R. 9 Ch. 557, per Mellish, L. J., at p. 560.

There can be no reason, then, as a general rule, against the company maintaining an action for calls and for all other purposes in its own name. The objection here turns upon the order requiring the money to be paid personally to one of the liquidators; and although a written engage-

ment made with the liquidator on behalf of the company might not prevent the company from suing upon it, it certainly is different when the document,—in this case, the order to pay,—is treated as in the nature of a decree or judgment, and an action is brought upon it by the company, when they are not the recipients designated in the order.

The 75th section of “The Companies Act, 1862,” says, “The liability of any person to contribute to the assets, under this Act * * shall be deemed to create a debt (in England and Ireland of the nature of a specialty,) accruing from such person at the time when his liability commenced, but payable * * when calls are made as hereinafter mentioned for enforcing such liability.”

That shews the liability is not by virtue of the order to pay, but by virtue of the member's original contract. The order to pay only defines and ascertains the amount of the debt, and the time when it is to be paid.

We are disposed to think that it is not the order alone which determines who is to receive the money from the member, but that the whole proceedings may be looked to for that purpose.

That order is made in a partnership suit. The money is the property of the company, and has never been transferred from it. It is certainly not the money or the estate of the liquidator.

We can see no objection to the Company, notwithstanding the money is to be paid to the liquidator, filing a bill in the corporate name against the debtor for an account, or proving the debt on his estate if he were a bankrupt.

I am not disposed to yield to the objection, although I am not quite certain that my conclusion is altogether correct. I think it is, but I am not assured of it.

If it be not, it is a matter which is amendable: that is, the writ of summons and all subsequent proceedings can be amended by inserting the names of the two liquidators, or of the one liquidator, as the plaintiffs may be advised: *La Banca Nazionale Sede di Torino v. Hamburger*, 2 H. & C. 330.

The liquidators have certainly proceeded in their own names as parties to suits in several cases, as in *Turquand v. Kirby*, L. R. 4 Eq. 123; *Webb v. Whiffin*, L. R. 5 H. L. 711; *Kemp v. Tucker*, L. R. 8 Ch. 369; *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. App. 29.

In other cases the suits have been in the name of the Company, as in *The United Ports and General Insurance Co. v. Hill*, L. R. 5 Q. B. 395.

In *Turquand v. Kirby*, L. R. 4 Eq. 123, the Master of the Rolls said, that the Company may sue as well as the liquidator.

In *Kemp v. Tucker*, L. R. 8 Ch. 369, the Court would not at the instance of the liquidator stay an action against him personally at law, because he had a full defence there, as he was not personally liable.

Lindley on Partnership, 3rd ed. 515, states that suits and actions should be brought in the name of the Company; and the 95th section of the Act, if we could refer to it, says so expressly.

Great liberality is shewn in permitting those to sue in one country who are entitled to sue in another country: *Alivon v. Furnival*, 4 Tyr. 751, 771; *La Banca Nazionale Sede di Torino v. Hamburger*, 2 H. & C. 330.

Upon the whole, though with some but not with any serious hesitation, I come to the conclusion that the plaintiffs are entitled to maintain this action in their own name.

The third question is, whether the plaintiffs have stated their cause of action sufficiently? From what I have already said it may be inferred that I think they have.

The 106th section says the order shall, subject to appeal, be conclusive. As the condition is placed in this section, the fact of an appeal should have been negatived, or, if one were had, the failure of it should have been shewn; but I am of opinion the allegation that the order during all the time aforesaid was and still is in force, must be held to have cured the objection, especially as it was not taken by the defendant.

It is shewn the defendant was a member of the Com-

pany and the holder of one hundred shares in it, and liable to contribute to its assets, and that he was settled on the list of contributories for such shares as such member; and a call was made on the shares, which he has not paid, although he was duly served with such order, and all things happened to entitle the plaintiffs to sue for the money which is claimed.

That states a good cause of action. It was not necessary the plaintiffs should more particularly have alleged the defendant to have been a member at the time the call was made. His continuance as a member until the contrary is shewn will be presumed. The declaration does not shew the shares were not paid up, or that there was anything due upon them; nor do the precedents contain any such averment in an action for calls.

The count in such a case states the defendant to be indebted in so much money for calls on so many shares. This declaration does not expressly contain that allegation, but it does allege the defendant owes so much for calls made on his shares. The count in that respect, we think, is sufficient.

We now come to consider the case as it is affected by the subsequent pleadings.

The first plea, never indebted, is a good plea according to the authorities, and it was admitted by Mr. Robinson to be so if the debt sued for were not a specialty claim.

The English statute, by sec. 75, makes the debt of the nature of a specialty in England and Ireland.

If it were a specialty, which is more than "of the nature of" a specialty, in England, that would not make it a specialty in this country if it were not by our own law a specialty.

That is the opinion expressed in *Story's Conflict of Laws*, 7th ed., sec. 567; and *British Linen Co. v. Drummond*, 10 B. & C. 903, is to that effect. *Bank of United States v. Donnally*, 8 Peters R. 361, is expressly in point.

Assumpsit, or debt, is the form of action brought upon foreign judgments. They are simple contract debts in this

country, whatever force as debts by specialty or record they may have in the country of their recovery; and non-assumpsit, or never indebted, may be pleaded to the action upon such judgment.

The original cause of action is not merged by the recovery of a foreign judgment: *Hall v. Odber*, 11 East 118; *Smith v. Nicolls*, 5 Bing. N. C. 208.

Calls made under the Winding-up Acts were not before the Act of 1862 considered as specialty debts: *In re Royal Bank of Australia—Robinson's Executor*, 2 Jur. N. S. 11 & 1173. See *Cork and Bandon R. W. Co. v. Goode*, 13 C. B. 826.

Whether the call was made under the statute of 1862 or under the Company's memorandum of association, stated in the count, or whether the liability of the contributory is in the nature of a specialty in England and Ireland, or a specialty there, will make no difference. The memorandum of association is not stated to have been under seal; and if it had, from the authority referred to, it might have been of no consequence, as the call is held not to be under the articles of association, but under the statute.

And neither the statute nor the recovery in the form of a decree or judgment will constitute the debt a specialty debt in this, a foreign country.

The second plea, that the cause of action did not accrue in six years, is for the reasons just given a good plea. The debt not being a specialty, but a simple contract only, the bar is not twenty but six years.

The 5th, 6th, 11th, 12th, and 13th pleas all depend upon whether the winding-up order is conclusive, so as to exclude the defendant from traversing the respective allegations contained in these pleas.

In England it is quite settled that a judgment or decree, final in its nature, for the payment of a specific sum of money, cannot be controverted on its merits. The defendant is not allowed to raise in the action on the judgment any matter of defence which he could have pleaded to the original action in the foreign country.

Messina v. Petrocchino, L. R. 4 P. C. 135, is the last or one of the last decisions upon the point. That view may be considered as established from the time of the case of *Henderson v. Henderson*, 6 Q. B. 288.

But our own statute, 23 Vic., ch. 24, does, in section 1, expressly enact that "any defence set up or that might have been set up to the original suit may be pleaded to the suit on the judgment or decree" obtained in a foreign country.

That is against the rule which prevails in other countries.

It may, however, have been passed to protect defendants from such a case as *Kingsmill v. Warrener*, in Appeal, 13 U. C. R. 18, and to meet such a case as has since happened, where the foreign Court contemptuously disregarded the comity of nations: *Simpson v. Fogo*, 6 Jur. N. S. 949; and to meet the chances of mistakes being made in English law by foreign tribunals, as in *Scott v. Pilkington*, 2 B. & S. 11, and *Castrique v. Imrie*, 8 C. B. N. S. 1, 405, L. R. 4 H. L. 414.

However it may be, in my opinion it is not well to isolate ourselves from other countries in this respect, and to refuse to give the like measure which we would receive from others.

The pleas are therefore not objectionable, because they traverse facts which could have been set up in the original proceedings.

The tenth plea shews that the defendant ceased to be a member of the Company before the presentation of the petition to wind up, and that he was not a member at the time of presenting the petition, or of the making of the order, or at any time since a present or existing member of the Company within the meaning of the said enactments, but during all the said time was and still is only a past member.

The liabilities of a past member are to contribute to the assets of the Company only if it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them, and then only in

respect of debts of the Company contracted before the time at which he ceased to be a member.

The purpose of the plea is, to render the declaration objectionable in case it should be held, now that the plea shews the defendant was only a past member, that it was necessary for the plaintiffs to set out, by way of averment, that it did appear to the Court that the existing members were unable to pay the debts of the Company, and that the order, which was made on the defendant to pay, was made in respect of a debt or liability of the Company contracted before the time he ceased to be a member.

The declaration was not open to the objection until the plea was pleaded. Now that it is pleaded, it appears the declaration should expressly, or by reasonable inference, shew such a state of facts as do attach a liability upon the defendant as a past member.

The plaintiffs might have replied such matters which shewed the liability was complete against the defendant as a past member.

The question now is, does the declaration shew, by way of reasonable inference, for there is no express averment, that the Court was of opinion the present members were unable to satisfy the contributions required to be made by them, and that the defendant's call is for a debt or liability of the company before he ceased to be a member it?

The declaration does shew that the defendant, although he is to be considered as a past member, was liable to contribute to the assets of the company, and the plea shews the same. The declaration then shews that the Court, by order, settled the defendant on the list of contributories in respect of the 100 shares as a member or contributory in his own right, and afterwards by an order made a call upon the defendant on the shares to the amount in question; and that all things happened, and were done, and all times elapsed necessary to render the defendant liable to pay the money, and to entitle the plaintiffs to maintain this action for the same.

We are of opinion the general averment, that all things

happened and were done to render the defendant liable to pay, and to entitle the plaintiffs to maintain this action, is sufficient to shew the Court was of opinion the present members were unable to satisfy the contributions made upon them, and that the call on the defendant was for a debt which accrued against the company before he ceased to be a member.

The like general averment was held to include the facts that an insurance company had sufficient funds to pay out of the premiums and reserved funds, and that the council of the company had adjusted the amount to be paid to the plaintiffs: *Bamberger v. Commercial Credit Mutual Assurance Society*, 15 C. B. 676.

So here it may include the fact that the Court was of opinion the present members would not be able to pay, and that what the defendant was called on to pay was for a debt contracted before he ceased to be a member: that is, as before stated, if the defendant is to be considered as sufficiently charged in this action as a past member.

But we are of opinion he is not so charged—on the contrary, he is expressly charged *as a member*—and therefore the sufficiency of the averments to hold him liable as a past member does not arise. The plea traverses that the defendant was a member by shewing he was a past member, and that is a good plea.

It cannot be said a member is the same as a past member, for the 38th section, and sub-sections 1, 2 and 3 of that section, shew the difference between them. Sub-section 2 speaks of the past member as one who has “ceased to be a member.” We think the plea is good, and that the declaration will be liable to the objection of a variance in that respect at the trial, if the plea be true in fact, if it be not amended.

A member who has fully paid up may be on the contributory list: *In re Anglesea Colliery Co.*, L. R. 1 Ch. 555. But a past member can only be proceeded against for the special liabilities for which past members are made responsible: *Webb v. Whiffin*, L. R. 5 H. L. 711; *Morris's case*, L. R. 8 Ch. 804.

The 16th plea, which alleges the order sued upon is not final, but can be varied, rescinded, or set aside by the Court, is, we think, a good plea.

It contains a positive allegation, that the order is not final; and it alleges that the reason of it is, that the order may be varied, rescinded, or set aside by the said Court.

If that can be done by the same Court, the order, we presume, is not final, on the authority of the cases which were referred to. But the finality of it must depend upon the matters and causes for and upon which the variation, rescission, or vacating it may be made. If it be on altogether discretionary grounds with the Court, there may be some ground for insisting there is no finality in it, but if it be for such causes only as will invalidate it on a rehearing or on appeal, the order has and will have finality until it has been varied, rescinded, or set aside.

In one sense it may properly be said the order is not final, because the Court may deal in a special manner with the order and with the whole winding-up proceedings, which would ordinarily prevent any decree, order, or judgment, subject to so be dealt with, from being final, for the purpose of a recovery being had upon it in a foreign country.

The Court may order a contributory, under the Debtors' Act of 1869, to pay his calls by instalments yearly or otherwise: *Imperial Mercantile Credit Association Limited*, *Lewis's case*, 28 L. T. N. S. 396, 42 L. J. Chy. 379.

So the Court may discharge the petition and all proceedings for winding-up, on the petition of the shareholders, for the purpose of continuing the Company and enabling them to resume business on payment of all claims against it: *In re South Barule Slate Quarry Co.*, L. R. 8 Eq. 688.

The money, too, which is to be paid to the liquidator may or may not all be required, for not only have the creditors, to be paid, but the shareholders and contributories, as between themselves, are to have their respective rights and liabilities adjusted; and one who pays in so much money

may have to get so much back again, not, however, of what he has paid in, but from some of his fellow contributories upon a full settlement being made.

We do not think, as we have before stated, that these matters afford any ground for not treating the order as final so long as it stands unaltered. The contributory must pay the amount he is ordered to pay, and he may or may not, depending altogether upon ulterior circumstances, be benefited or not by a future and separate and different accounting and adjustment.

The declaration shews in our opinion, therefore, a sufficiently final order, and the plea traverses the finality, which we think it may properly do; and from what it states it may be the order is not final. The defendant undertakes to shew it so as a matter of fact.

Then as to the replication to the last plea. While the plea alleges the order is not final, because it may be varied, rescinded, or set aside by the Court, the replication, setting out the 124th section of the Act, shews that the order may be reheard or appealed upon a notice given within three weeks from the making, or later if the Court, should extend the time, and that no such notice was given within the three weeks, nor was the time for that purpose extended by the Court; and so the causes given by the defendant in his plea for the order not being final, because it might be varied, rescinded, or set aside, cannot and do not apply, inasmuch as the defendant has neither applied for a rehearing nor has he appealed. The replication is sufficient.

The result is, that all the pleadings—declaration, pleas, and replication—are good, and there will be judgment accordingly.

Judgment accordingly.

REIFFENSTEIN V. HOOPER ET AL.

Bond to secure alimony—Right to assign—Pleading—Departure.

A bond given to a trustee, by a husband and his surety, to secure payment of alimony to the wife, in pursuance of a decree of the Court of Chancery, was held not to be assignable by the trustee and the wife, such assignment being contrary to public policy, and tending to lessen the inducement to reconciliation.

The plaintiff declared as assignee of such bond Defendant pleaded, on equitable grounds, the decree in Chancery for alimony: that the bond was given in pursuance thereof to the obligee, who had no beneficial interest therein, and the assignment was in fraud of the decree, against the will of the husband, and could not be maintained in equity. The plaintiff replied that the wife by deed assigned her beneficial interest to him. *Seemle*, that the replication was not a departure.

DEMURRER. Declaration. First count: for that the defendants, Edmund John Hooper and Mary Hooper, by their bond, bearing date the 11th April, 1871, became bound to one Peter Cameron in the sum of \$5,000, to be paid to the said P. C. by the defendant E. J. H., subject to a condition thereunder written, that if the defendant E. J. H. should pay to the said P. C. the sum of \$30, quarterly, on the first day of the months of January, April, July, and October, in every year during the life of one Emma Hooper, who is still living, the said bond should be void; and that the said P. C., on or about the 22nd of December, 1873, assigned the said bond to the plaintiff, and afterwards, on the first day of the month of April, 1874, the sum of \$30 for one of the said quarterly payments became due to the plaintiff, and is still unpaid.

Second count: setting out the same bond and assignment to the plaintiff, and alleging a breach in respect of \$30 due 1st July, 1874.

Plea, on equitable grounds: that the bond in the first and second counts mentioned are one and the same and not other and different bonds, and that one Emma Hooper, wife of the defendant E. J. H., heretofore, to wit, on or about the 4th day of March, 1871, filed her bill in the Court of Chancery, at Toronto, against the said defendant E. J. H., and therein prayed for alimony against the said E. J. H., and such proceedings were had in the said suit that a decree

was made in the said suit in the words following, that is to say :—

IN CHANCERY,) Monday, the 24th day of April, A.D. 1871.
V. C. Mowat.) Between

Emma Hooper, Plaintiff,

and

Edmund J. Hooper, Defendant.

1. This cause coming on this day to be heard before this Court, at Kingston, in the presence of counsel for all parties, upon opening of the matter, and upon hearing what was alleged by counsel aforesaid, and the defendant by his counsel consenting thereto.

2. This Court doth order and decree that the defendant do pay to the plaintiff the sum of \$120 yearly, and every year, by way of permanent alimony, the payment thereof to be secured by the joint bond of the said defendant and one Mary Hooper, the mother of the said defendant.

3. And it is further ordered that the defendant do forthwith pay to the plaintiff the same sum of \$100 as and for her costs of this suit.

(Signed) A. GRANT,
Registrar.

Entered 4th May, 1871, D.B. 23, }
Folio 214, Sd. F. A. }

And the defendants in this suit, in pursuance of the said decree and to give effect to the same, made and executed the bond in the declaration mentioned to the said P. C. in the declaration mentioned, who had not and never since has had any beneficial interest therein, and the said bond was so made to him to secure the permanent alimony in the decree mentioned to and for the sole use of the said Emma Hooper, and for her sole benefit, and for her personal maintenance, in pursuance of the said decree; and that the said bond was not nor is it assignable by the said Peter Cameron to the plaintiff, and the pretended assignment thereof to the plaintiff is in fraud of the said decree, against the will of the said E. J. H., and a dealing with the subject matter thereof wholly foreign to the purpose for which the same was given, and cannot be maintained in Equity.

Replication: that by deed, bearing even date with the said assignment, the said Emma Hooper assigned to the plaintiff her beneficial interest in the said bond.

Demurrer to the replication, on the grounds: 1. That the declaration and pleadings shew a personal obligation on the defendant E. J. H. to maintain and support Emma Hooper, his wife, as well as the obligation existing to that effect at law, and the said bond was given to secure the said personal support, and is not the subject of assignment or transfer, whilst said transfer would defeat the very object of the bond.

2. The replication is a departure from the declaration, and sets up an entirely new cause of action.

Joinder.

The plaintiff excepted to the pleas on the grounds:—

1. That the said plea is pleaded on equitable grounds, but attempts to defeat the plaintiff's action at law on legal grounds.

2. That the said plea assumes that if the plaintiff's claim is only an equitable one, the plaintiff has no *locus standi* in this Court, but the plaintiff's cause of action is one that may be prosecuted in this Court as well as in a Court of Equity.

3. That the plea would be no answer to the plaintiff's suit had she pursued her remedy in Equity.

4. That the plea assumes that if the plaintiff's interest is only that of a trustee he cannot sue in this honorable Court, whereas the plaintiff always had a remedy in equity, and this Court has cognizance of a claim though purely equitable.

5. The defendants in said plea admit that default has been made in payment of the moneys payable under the said bond, and that the defendant E. J. H. was bound to pay the same, but set up no reason or excuse for the non-payment of the same.

6. The defendants do not shew any reason why the said bond was not assignable by the said P. C. to the plaintiff, and the said bond was in fact assignable under the circumstances disclosed in the said plea.

November 30, 1874. *K. Mackenzie*, Q.C., for the demurrer. The replication is a departure. There could be no such assignment, for it would be wrong and contrary to the policy of the law to allow a wife, by anticipation, to receive a large sum of money at once: *Hyde v. Price*, 3 Ves. 437; *Hagarty v. Hagarty*, 11 Gr. 562; *Hunt v. DeBlaquiere*, 5 Bing. 550; *Dickson v. Swansea Vale and Neath and Brecon Junction R. W. Co.*, L. R. 4 Q. B. 44; *Roper on Husband and Wife*, 2nd ed., vol. ii., 303, 304: See as to departure: *Bartlett v. Wells*, 9 B. & S. 836; *Brine v. Great Western R. W. Co.*, 2 B. & S. 402. The declaration also is insufficient, under 35 Vic. ch. 12, sec. 13, O., as it is not shewn that the debt arose out of contract. The exceptions to the pleas are unimportant, for they only amount to this, that the defendants have pleaded equitably what is a good legal defence.

J. K. Kerr contra. Section 3 of the Act quoted shews that in order to enable the assignee to sue he must "at the time of action brought" have "the beneficial interest." The object of the plea is to shew that we had not such beneficial interest: that Cameron's assignment conveyed nothing, and that Reiffenstein stands in no better position. Now, under the Administration of Justice Acts we have the same rights and remedies in this Court as in a Court of Equity, and there our pleading would be good. [WILSON, J.: Does this action arise out of contract? Should not this argument rather turn upon a question of public policy?] The object of the plea is, to shew that the beneficial interest being in Mrs. H., we cannot set up the assignment, and therefore we set up in our replication that she has assigned that also: *Rixon v. Emary*, L. R. 3 C. P. 546; *Hooper v. Hardwick*, L. R. 5 C. P. 4; *Savin v. Hoylake R. W. Co.*, 1 Eq. 9; *Kitson v. Hardwick*, L. R. 7 C. P. 473, 480; *McCulloch v. White*, 33 U. C. R. 431; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69. [RICHARDS, C. J.: The difficulty might have been avoided by amending the declaration.] Next, as to the bond not being assignable on grounds of public policy. There

is nothing to prevent such a bond being assigned. The husband would not be liable for necessaries if the wife got the money in a lump sum and expended it at once.—[RICHARDS, C. J.—Are you sure of that? WILSON, J.—By introducing a third party as assignee, you bring in an element to keep the husband and wife apart.] On the contrary, we argue that the effect would be to produce a reconciliation. In *Henderson v. Henderson*, 19 Gr. 464, a fixed sum was approved of. [MORRISON, J.—That was by consent.] See also *Gracey v. Gracey*, 17 Grant 113; *Hooper v. Hooper*, 3 Swabey & Tristram 251; *Thomas v. Thomas*, 2 Swabey & Tristram 113; *Bank of British North America v. Matthews*, 8 Gr. 486; *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. 391; *Auster v. Holland*, 15 L. J. Q. B. 229; *Kenge v. Delovall*, 1 Vern. 326; *Ferrars v. Ferrars*, 1 Vern. 71. [RICHARDS, C. J.—We may suppose that the husband has some interest that his wife should receive support, even though never intending to live with her, and he perhaps chose the trustee because he had confidence in him.]

March 2, 1875, RICHARDS, C. J., delivered the judgment of the Court.

The Statute of Ontario, 35 Vic., ch. 12, provides for the assignment of choses in action, and that the assignee may sue in his own name, when the debt or chose in action arises out of a contract and the assignment is in writing.

The sixth section of the statute provides that after the assignment and notice given to the debtor or other person liable, the assignee shall "have, hold, and enjoy the same, free from any claims, defences, or equities which might arise after such notice as against his assignor."

The bond in question was given to carry out a decree of alimony in a suit brought at the instance of the party for whose benefit the deed was made against one of the defendants. The decided cases shew that if the husband

fails to pay the alimony as decreed by the Ecclesiastical Court, he may be sued at law for necessaries furnished to his wife.

In giving judgment in *Hunt v. DeBlaquiere*, 5 Bing. 550, where this was decided after an able argument on both sides, Park, J., said, at p. 560: "No distinction can be drawn between maintenance under a separation deed and maintenance by virtue of a decree of alimony."

The decree of alimony, as I understand it, is not final in its nature, and if the parties cohabit afterwards, it will cease altogether. I am under the impression it may be varied according to the altered circumstances of the parties.

As a matter of public policy the parties ought to be encouraged to cohabit rather than live separate. Maintenance is often withheld when it is proper to do so, when it would have the effect of promoting a reconciliation between the husband and wife, which it is the object of the law to do: *Roper*, on Husband and Wife, 2nd ed., vol. ii., p. 315.

If after the separation the husband and wife be reconciled and live together, that circumstance will avoid the deed or articles, and will determine the separate allowance. This was so considered by Lord Eldon, in *Lord St. John v. Lady St John*, 11 Ves. 525, 537, and by Buller, J., in *Fletcher v. Fletcher*, 2 Cox 99, 105.

The law in this respect acts in consistency with the practice of the Ecclesiastical Court, for in general where a reconciliation takes place between the parties there is an end in that Court of the deed or articles of separation: *Roper*, 2nd ed., vol. ii. 316, 270-271, in notes; *Bright's Law of Husband and Wife*, vol. ii. 319.

This doctrine may be considered somewhat shaken in respect to a separate allowance granted under a deed which may be considered in the nature of a post nuptial settlement: *Randle v. Gould*, 8 E. & B. 456, referred to in *McArthur v. Webb*, 21 C. P. 360. But here the alimony was granted by our Court of Chancery under powers conferred by the Court of Chancery Act, Consol. Stat. U. C.,

ch. 12, sec. 29, and the bond sued on was given in pursuance of and to carry out that decree.

It seems to me, therefore, that the general policy of the Ecclesiastical Courts and Courts of Equity in England must attach to this security, particularly as our statute referring to alimony says, "and alimony when decreed shall continue until the further order of the Court."

Then if the general policy of the law is to encourage the parties to live together again, and, on that taking place, that the alimony should cease, anything which tends to deter the parties from future cohabitation would seem to be against the policy of the law, and therefore void.

In *Hagarty v. Hagarty*, 11 Grant 562, the present Chancellor of this Province refused to allow a certain sum to be paid in lieu of future alimony on grounds of public policy, as after that there would not be the same inducement on the part of the husband to return to cohabitation with his wife.

Here the bond being absolutely assigned, and all sums to accrue due being transferred, there would not now be the same inducement to the husband to return to cohabitation as before, particularly as under the sixth section of our statute, allowing the assignment of choses in action, the parties by subsequent arrangement could not deprive the present plaintiff of her rights under the bond if assignable.

Courts have in analogous cases held that assignments of claims are void.

In *Lidderdale v. Duke of Montrose*, 4 T. R. 249, it was held that the future half pay of an officer was not assignable, on principles of public policy, as well as on account of the interest of the officers themselves, and that such assignments were void.

Many of the cases are referred to in the argument in *Randle v. Gould*, 8 E. & B. 456.

The power of the wife absolutely to dispose of funds settled upon her for her maintenance is referred to in *Roper on Husband and Wife*, 2nd ed., vol. ii., 303, 304; and it is

there stated that the law on that point does not appear to be finally settled. I should think a bond carrying out the decree of the Court as to alimony would scarcely be considered in the same light as funds settled so as to vest in the wife for her separate use.

As to the question of departure raised on the demurrer, in the view taken, that the bond sued on cannot properly be assigned under the statute, it becomes unimportant to decide it. As at present advised, however, I think there is no departure.

In *Dickson v. Swansea Vale and Neath and Brecon Junction R. W. Co.*, L. R. 4 Q. B. 44, it was held that the replication was good. There the plaintiff sued on a bond. The defendants set up as an equitable defence that the plaintiff was to indemnify the defendants against this very bond. Replication, that the plaintiff assigned the bond to third persons, of which defendants had notice, and these persons had no knowledge of the agreement between plaintiff and defendants, and the action was brought in plaintiff's name as trustee for the third persons, who were the beneficial owners of the bond:—Held, that the replication was good, as the bonds were delivered to the plaintiff by defendants to raise money on them.

In *Brine v. Great Western R. W. Co.*, 2 B. & S. 402, the plaintiff brought his action for wrongfully raising an embankment opposite his house, whereby water was caused to flow against and into his house. Plea, that the embankment was raised, made, and formed under the defendants' Act of Incorporation. Replication, that the injury was caused by the wrongful construction and negligent and improper raising, making and forming of the embankment, and the want of proper drains for the same.

Mellor, J., at p. 410, referred to the case of *Palmer v. Stone*, 2 Wilson 96, as distinguished. There the defendant impounded the mare damage feasant, which was a private trespass, whereas the rejoinder, that the mare was mangy, set up that which was a common nuisance.

Crompton, J., in his judgment said, at p. 413: "The evidence which would prove the replication would therefore support the declaration, according to the test proposed by Lord Chief Justice Tindal, cited by my brother Mellor; and it should be observed that the facts in the replication do not the less prove the declaration because the replication contains something more in answer to the plea than would be necessary to prove the declaration, *so long as the new matter is not inconsistent* with that in the declaration. The case in principle does not differ from the ordinary case of a plaintiff replying to a plea setting up a license or authority in law, or in fact, or under a deed, that the acts were not such as were covered by the license, or were acts done in excess of it: See *Bracegirdle v. Peacock*, 8 Q. B. 174, 186. The plaintiff was not called upon to anticipate the defence by shewing that the works were not justified by reason of an Act of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matter alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle; as in the case when a plaintiff alleges in his declaration that a defendant, from whom he expects a plea of infancy, was of full age when he executed the instrument declared on. Such pleading is what is called 'leaping before you come to the hedge.'"

Here *primâ facie* the obligee of the bond has a right to assign. The defendant might shew by way of equitable defence that the payee was only a trustee, having no beneficial interest. The plaintiff might surely displace that by shewing that the bond was assigned at the request of the party for whose benefit the bond was made, and who alone was beneficially interested. It sets up no new case, and merely displaces what might be a bar to his *primâ facie* right. The assignment by the beneficial party can *per se* convey no greater right than existed if the transfer was made at her request, and would, if made before the assignment by the obligee of the bond, be evidence of a request so to do, and if after the assignment would be a confirmation of it.

The cases where parties in insolvency sue on notes or demands payable to themselves, who have had their estates restored to them under a deed of composition and discharge, seem to be somewhat analogous.

In those cases the plaintiff declares on a debt originally due to him as if due to him down to the present moment, whereas in his replication he relies on the statutory right. This is said to be a departure.

Willes, J., in *Kitson v. Hardwick*, L. R. 7 C. P., at p. 480, says: "I think that is a fallacy. All that the replication amounts to is, that by means of a purchase from the trustee the plaintiff has got rid of a claim which might have interfered with his right to sue for this debt."

In *Rixon v. Emary*, L. R. 3 C. P. 552, Bovill, C. J., said: "The replication does not set up the separate liability as to the cause of action, but only for the purpose of defeating the plea, and thus maintaining the cause of action upon which the declaration was originally framed."

Here the replication is only for the purpose of defeating the plea as virtually denying the obligee's right to assign.

Myers v. The London and South Western R. W. Co., L. R. 5 C. P. 1, is to the same effect as *Kitson v. Hardwick*.

Judgment for defendants.

LUCE V. COYNE.

Promissory note—Handwriting—Evidence of experts.

In an action on a promissory note against the maker, the defendant swore that the signature was not his, but an expert, comparing it with admitted signatures, said that it was written by the same person. The jury having found for the plaintiff: *Held*, on appeal from the County Court, no ground for a new trial that the jury had not been directed that the evidence of experts was entitled to little weight when contradicted by direct testimony; and the learned Judge below having been satisfied with the verdict, this Court would not interfere.

APPEAL from the County Court of the County of Elgin.

Action on a promissory note for \$90, made by defendant William Coyne, payable to M. W. Abbott, or bearer.

Plea: Non fecit.

At the trial before Hughes, Co. J., and a jury, one *Thomas Eedson*, an expert, was called, who said that the note sued on and some of defendant's signatures admittedly genuine, were written by the same person.

Another witness, called by the plaintiff, who was acquainted with defendant's handwriting, did not recognize the signature as defendant's, and others thought it was defendant's signature.

For the defence, the defendant swore that he and his two brothers met M. W. Abbott on the road about the time the note was dated, and after a conversation Abbott appointed him (defendant) his special agent to sell cultivators: that upon that occasion Abbott gave him a document, which he produced, appointing him such special agent, and that he signed that paper, and that no note or other document was then, or at any subsequent time, signed by him in Abbott's favour.

The jury found a verdict for the plaintiff, for \$120 38.

This verdict was moved against on grounds similar to those taken here as grounds of appeal, and which appear in the judgment, and after consideration the rule was discharged.

The defendant appealed.

Feb. 5, 1875, *Mackenzie*, Q.C., for the appellant, cited as
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to comparison of handwriting, *Doe d. Perry v. Newton*, 5 Ad. & E. 514; *Griffith v. Williams*, 1 Cr. & J. 47.

Hodgins, Q.C., contra, cited *Creighton v. Chambers*, 6 C. P. 282; *Davis v. Brecknell*, L. R. 3 P. & D. 88; *Chadd v. Meagher*, 24 C. P. 54, as to the reluctance with which Courts would interfere in such a case as this, fairly left to a jury.

March 2, 1875, RICHARDS, C. J., delivered the judgment of the Court.

The application in the Court below was substantially to grant a new trial, the verdict being against the weight of evidence, and on account of the absence of a witness, when no application had been made at the trial to put off the case.

The point on which the case turned was, whether the signature to the promissory note was that of the defendant or not.

The learned Judge heard the evidence, saw the signatures that were genuine and that which was said to be spurious, and the whole case was submitted to the jury, with a charge not complained of, except on one point, which seems untenable.

That point is that there was non-direction of the jury by the learned Judge, "in not having informed them that the evidence of an expert, which was the only evidence in the plaintiff's favour, is entitled to but little weight, especially when contradicted by direct evidence to the contrary."

No authority was cited to shew that this, even in the broad terms stated in the grounds of appeal, was any ground for a new trial. The jury must judge of the evidence of experts as well as of that of the parties.

The other grounds of appeal stated are :—

1. A new trial should have been granted, the verdict being against the weight of evidence.
2. It was contrary to the evidence, and perverse.
3. The absence of the witness.

When there is evidence to sustain the verdict, and the Judge who tried the cause is satisfied with it, the rule of law is, that a new trial will not be granted either on the first or second ground here taken.

As to the absent witness, the learned Judge refers to the defence set up at the trial, and the attempt to get a new trial now, and to shift the ground of the defence, as well as the excuse for not putting off the trial on account of the absent witness, are there fully considered.

We certainly would not have interfered with the decision of the learned Judge if he had granted a new trial; but we do not think a sufficiently strong case is made out to justify us in ordering a new trial in the Court below on the grounds suggested by the reasons of appeal, particularly as the learned Judge, before whom the case was tried, is satisfied with the verdict.

Appeal dismissed, with costs.

MCLAREN ET AL. V. RYAN.

Timber licenses—Timber cut in Quebec—Right of action here—Right to sue—Expiration of license—C. S. C., ch. 23, sec. 2.

Trespass or trover will lie here for timber cut in the Province of Quebec, (the declaration not charging any trespass to the realty), although it may be necessary in such action to try the title to the land on which it was cut.

The plaintiffs held timber limits under licenses granted from 30th December, 1865, to 30th April, 1866; from 15th October, 1866, to 30th April, 1867; from 30th December, 1867, to 30th April, 1868; and from 16th November, 1870, to 30th April, 1871. The timber in question was taken in the winter of 1866-7; and this action was not brought until November, 1871, after the last license had expired. The C. S. C., ch. 23, sec. 2, enacts that such licenses shall vest in the holders thereof all rights of property in all timber cut within the limits during the term thereof, and to prosecute all trespassers to punishment, and to recover damages, if any; "*and all proceedings pending at the expiration of any such license may be continued to final termination as if the license had not expired.*"

Held, that the concluding clause did not prohibit a licensee from suing after the expiration of his term, and that the action might be maintained.

DECLARATION: Trespass and trover, for taking 315 sticks of timber, the property of the plaintiff (a).

(a) The declaration is more fully set out in the judgment post p. 311.

Pleas: Not guilty, and that the timber was not the plaintiffs' property.

Issue.

The cause was tried at Ottawa, at the last Spring Assizes, before Galt, J., without a jury.

The evidence was as follows, so far as it is necessary to refer to it:—

Alexander J. Russell, the Crown Timber Agent for the Province of Canada, proved that he had issued to the plaintiffs the following licenses to cut timber and saw-logs in the then Province of Lower Canada. The first was from the 30th December, 1865, to the 30th April, 1866; the second was from the 15th October, 1866, to the 30th April, 1867; the third was from the 30th December, 1867, to the 30th April, 1868; the fourth was from the 16th November, 1870, to the 30th April, 1871. He said the plaintiffs had been the licensees of the limits continuously since the first license was issued to them; that he had instructed Mr. Bell, a surveyor, to make a survey of the limits, and that such survey was made and a plan made of it.

It was admitted that the difference between the parties arose from a dispute as to boundaries.

It was then contended by the defendant's counsel that the plaintiffs must be nonsuited, as the learned Judge had no jurisdiction to try the case.

The cause however proceeded, for the purpose, as it was said, of avoiding a new trial, in case the Court should be of opinion that the action was maintainable.

It appeared the timber in question was cut by the defendant, who resided in Ontario, in the winter of 1866-'67.

It was stated by *Matthew Edward*, an advocate of the Province of Quebec, that when property in Lower Canada has been taken away and disposed of, an action may be instituted to recover damages; and that the person must have been in possession and have been deprived of his property before the action can be maintained.

The defendant's counsel then renewed his motion for a nonsuit, on the following, among other grounds:—

1. That the trespass and conversion took place in Lower Canada, and that the learned Judge had no jurisdiction over the cause.

5. That although the timber was brought into Ontario, by its passage through the Chats Slide, that was not until after the 30th of April, 1867, when the plaintiffs' license for that season had ended.

7. That this action was not brought until after the license had expired.

8. That it was not shewn this action could have been maintained in Lower Canada.

There were several other objections taken, but they have nothing to do with the matter of law which was raised by the first objection, and to which the fifth and eighth objections have some relation.

The seventh objection was also relied upon as a legal answer to the action.

The only matter of fact which was said to be in dispute between the parties was a question of boundary: that is, whether the timber was cut within the plaintiffs' limits or not—and the evidence appeared to establish that fact against the defendant.

The learned Judge was of opinion he had no jurisdiction to try the case. The act complained of took place in Lower Canada; it was one connected with the realty, and, in his opinion, was therefore local. He proposed to nonsuit the plaintiffs.

The plaintiffs' counsel contended that if there was no jurisdiction to try the cause, there was no jurisdiction to nonsuit; but in deference to the learned Judge's ruling, he accepted a nonsuit, which was entered.

In Easter term, May 21, 1874, *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside, on the ground that the learned Judge erred in holding he had no jurisdiction to try the cause; and that if he had no jurisdiction to try he had no power to nonsuit.

In Michaelmas term, December 4, 1874, *S. Richards*, Q. C., shewed cause. This action, although one count of the declaration is in form a trover count, is substantially for a trespass committed to the realty in the Province of Quebec, and the rule is, that no such action can be brought out of the locality or country where the land is: *Story's Conflict of Laws*, 7th ed., sec. 554. There is another objection to the plaintiffs' title, which is that this action was not begun until the 17th of November, 1871, and after the expiry of the plaintiffs' license: Consol. Stat. C. ch. 23, sec. 2; *White v. Dunlop*, 27 U. C. R. 237.

Harrison, Q. C., supported the rule. Trover will lie by the licensee, although in this case his license has expired: *McMullen v. Macdonell*, 27 U. C. R. 36—see also *McDonald v. Bonfield*, 20 C. P. 73; *Graham v. Heenan*, 20 C. P. 340; *Boyd v. Link*, 29 U. C. R. 365—and although the defendant is the grantee of the land from the Crown. If the timber taken was the property of the plaintiffs, they cannot be affected by the concluding sentence of sec. 2 of ch. 23 of Consol. Stat. C. If a wrong be done to any one in a country where a remedy is given for such wrong in that country, that wrong may, if it be of a personal nature, be proceeded for in another country, where similar redress can be given; and trespass to and trover for goods is only a personal cause of action: *Mostyn v. Fabrigas*, 1 Sm. L. C., 6th ed., 623, and the notes; *Doulson v. Matthews*, 4 T. R. 503; *Scott v. Lord Seymour*, 1 H. & C. 219; *Phillips v. Eyre*, L. R. 4 Q. B. 225; "*The Halley*," L. R. 2 P. C. 193.

March 6, 1875, WILSON, J., delivered the judgment of the Court.

It is not disputed that an action will lie in this country for a wrong which is merely personal, as opposed to that which is local, which has been committed in another country, and for which an action can be maintained in that other country.

What has been urged before us is that the count in trover is in effect the same as the count in trespass; and

although the declaration, reading the two counts as an act of trespass, does not give locality to the acts charged, yet the evidence shews that what the plaintiffs do complain of is, the taking of timber cut by the defendant on the plaintiffs' timber limits, situate in the Province of Quebec; and that the plaintiffs should not be allowed so to vary or frame their cause of action as to try a question of boundary or title to realty in a foreign country, under the colour and pretence of determining only a personal wrong, or whose property the timber is; because both or either of these questions can only be determined by first of all trying and determining whose land it was, or where the boundaries of the land are, upon which the timber was taken and from which it was removed.

What we have to decide is this: Is the cause of action—the trespass count, so as to put it the most strongly against the plaintiffs—one which is of a local nature, or does it partake of or affect the realty so that it must be tried where the property at the time was situated?

It is for “seizing and taking the plaintiffs' goods, that is is to say, 315 sticks of timber, and carrying away the same and disposing of them to the defendant's use.”

That is plainly a transitory cause of action only.

If it had been that the defendant entered on the plaintiffs' land, and there cut down and removed certain trees, that would have been a complaint to and in respect of the realty, and not sustainable here if it had been committed in Quebec.

Doulson v. Matthews, 4 T. R. 503, is in point, and is in accordance with all the later decisions.

But as the declaration complains of nothing to the realty, but for the taking of the plaintiffs' timber, it is not fettered by locality.

Mr. Justice Buller says in *Smith v. Miller*, 1 T. R. 475, at p. 479: “The general use of adding the second count is this: the first charges *an injury done to the land, and taking the goods there*: that is in its nature local, and must be proved where laid. Then the reason, and almost the

only one, for adding the second count is, in order to avoid the locality ; it is for taking goods *generally*. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere."

I need not refer to any other authority on that point, it is so free from doubt.

When the trees are cut and severed from the soil they are no longer part of the freehold, but are merely goods and chattels, and the owner of the land may sue in respect of the taking of the trees, although he does not choose to complain of the nominal damage done to him by the breaking and entry upon his land.

That in such an action as this the Judge is trying collaterally that which he could not try directly—what the boundaries of the land are and whose land it is—cannot be helped.

The same thing would have to be done if the Act had been done here, and it often happens that foreign law has to be dealt with.

In dower, ejectment, bigamy, and in many other cases, the validity and effect of a foreign marriage must be decided. In these cases the question may be said to present itself directly, but the same question might present itself in an action for goods sold and delivered, if the defendant were sued only on his strict responsibility as the alleged husband of the woman to whom the goods had been delivered ; or, until lately, in an action by two persons as husband and wife for a cause of action accruing to the alleged wife before marriage, or for some right which accrued to her after the marriage as the meritorious cause of action.

It may happen that a suit between two persons may necessitate an enquiry into some matters affecting a third person, and that enquiry will be made if it do not affect the peace or interests of that person : *DaCosta v. Jones*, Cowp. 729.

We do not here decide the title so as to bind the land or the parties interested in it ; we determine it for the purpose

only of saying whether the plaintiffs are entitled to be paid for the timber which they claim.

We might have had to determine the same matter if the defendant, when the timber was claimed, had given his bond to the plaintiffs conditioned to pay them the value of it when proved satisfactorily that it had been cut upon their limits. And it could scarcely be said that an action could not be maintained upon the bond in this country, because the enquiry necessitated the determination of the boundary of the property in question, merely because the realty was in Quebec.

It was further argued that as the alleged taking of the timber was in the winter of 1866-67, and the plaintiffs' license for that year expired on the 30th of April, 1867; and as the last license which the plaintiffs had for the timber limit expired on the 30th of April, 1871, and although it may be held that the plaintiffs, by reason of their right of pre-occupancy to the limit which is recognized by the Crown, should be held to have given them a continuous right from the 30th of December, 1865, to the 30th of April, 1871, yet they are not entitled to recover in this action for an invasion of their limit while their license for the season of 1866 and 1867 was in force, because they did not begin their suit while that license was in force, or at any rate did not begin their suit while the last of the renewed licenses, if they are to be deemed as continuous, was in force.

That argument arises from the concluding words of the Consol. Stat. C., ch. 23, sec. 2: "And all proceedings pending at the expiration of any such license may be continued to final termination as if the license had not expired,"* and from what was said by Draper, C. J., in *White v. Dunlop*, 27 U. C. R. 237, at p. 243: "It has been assumed in this action, that a holder of a license which has expired may institute an action for cutting trees during the time his license was current, though during its currency he took no proceedings. The concluding sentence of this section seems unnecessary if this assumption be correct."

The statute says, in sec. 2, the licenses "shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands, * * * and shall vest in the holders thereof all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, * * * and such licenses shall entitle the holders thereof to seize in revendication or otherwise such trees, timber, or lumber where the same are found in the possession of any unauthorized person, and also to institute any action or suit at law or equity against any wrongful possessor or trespassers, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any. And all proceedings pending," &c., as before stated.

The licensee has the power and right to cut up to the last moment of his term, and it would not seem right that he should lose all he had cut because he had not commenced his suit against the wrongdoer before the term had expired. According to this argument, it will make no difference whether the trespasser cut the timber for himself, or helped himself to that which the licensee had cut—nor any difference whether he took the stuff so cut by the licensee before or after the expiration of his term; in any such case the licensee is without remedy if he do not bring his suit for the wrong done to him before the license has ended, although he may have had no knowledge of the wrong which was done to him.

It was said the restriction as to suing after the determination of the license, was intended to operate strictly, because it was said the licensee was by section 3 of the Act to make a return only of his trees which were cut, manufactured and carried away *under such license*, and that it was only the timber which was cut *under the license* that Crown dues were to be payable upon (sec. 4), and so it was no loss of his if he did not get that which he had paid no duty on.

The timber cut by a trespasser during the continuance of the license cannot be said to have been cut under the

license; but *that* timber, although not returned by the licensee, will in some way or other, under the stringent provisions of the statute, have to pay duty unless there is some fraudulent evasion of it on the part of the person cutting it.

The Crown will therefore in no event suffer a loss; and although a trespasser does not in one sense cut under the license, he yet cuts while the timber is under a license; and it may also be said the timber is in fact cut under the license when the licensee seizes it—at any rate, if he seizes it while the license is in force; and whether he can seize it after that period is just the question.

The words that all proceedings pending at the expiration of the license may be continued to a final termination, as if the license had not expired, do not mean, in our opinion, that no proceedings shall be taken after the expiration of the license which have not been begun before its expiration.

The words are a provision that such proceedings so begun before the expiry shall still go on. They are not a prohibition of a licensee suing after the term is over.

If a trespasser is to cut the best of the timber, and to leave for the licensee that which he does not think good enough to take, the latter is sustaining the most direct and serious injury by paying a price for which he has got but little value, and by losing the profits of and upon a higher quality of timber, which the other has taken; and to say that he cannot sue for that injury, although he may not have discovered who the trespasser was till after the end of his own license, seems as much against what is right as it is against the words of the statute, that the license shall vest in the licensee "all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof," and "to prosecute all trespassers and other offenders to punishment, and to recover damages if any." A cause of action once vested cannot be taken away by Act of Parliament but by plain language, nor by the other party but by release, &c.

We should desire to hear more said on this subject than we have yet heard before we should say the plaintiffs must fail in their action for this cause.

There must be a new trial, because we think the act in question, although committed in Quebec, was not connected with the realty and was not local, but was and is a transitory matter enquirable into in this country, and because on the other point referred to the plaintiffs are entitled to recover.

Rule absolute.

COQUILLARD V. HUNTER.

*Agent of foreign corporation—Lease of goods by—Construction of lease—
Right to maintain replevin.*

Defendant in writing acknowledged the receipt from the plaintiff, described as Assistant Manager of the Howe Machine Company, of a sewing machine, on hire for 9 months at \$5 a month in advance. He agreed to pay \$45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessors to be in jeopardy, the plaintiff or the Company might resume possession of it; and the defendant waived all right of action for trespass, damages, or replevin by reason of any action taken by the plaintiff or the Company in resuming such possession.

The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the Company, a foreign corporation; and had no property in it except as their agent.

Held, reversing the judgment of the County Court, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions.

THIS was an appeal from a decision of the Judge of the County Court of the County of York, discharging a rule *nisi* to set aside a nonsuit.

The action was replevin, brought by the plaintiff for a sewing machine leased by the defendant under the following instrument:—

“ Lease.

Received of H. Coquillard, Assistant Manager for the sale of the Howe Machine Company's Sewing Machines, at Toronto, Ont., one Howe Sewing Machine, styled O. =||= B. T. Ex. No. 626,623, on hire, for nine months, at \$5 per

month, payable in advance, to be used at 128 Strachan Avenue, and not to be removed without permission of H. Coquillard or the Howe Machine Company's duly authorized Agent or Assigns. The said Sewing Machine, No. 626,623 being the property of the Howe Machine Company, on hire by me, and valued at \$45, which sum I agree to pay in the event of the said Sewing Machine being injured, destroyed, or not being returned to the said H. Coquillard or the Howe Sewing Machine Company, their Agent or Assigns, on demand, free of expense, in good order, reasonable wear excepted.

In default of the punctual payment of the said monthly rental in advance, or the due fulfilment of any condition or provision of this lease, or if the said machine be deemed by the lessors to be in jeopardy, the said H. Coquillard, or the said Howe Machine Company, their Agent or Assigns, may resume possession of said Sewing Machine, No. 626,623, without any previous demand. And I do of myself, and on behalf of my heirs, executors, administrators and assigns, waive all right of action for trespass, damages, or replevin, by reason of any action or process taken by the said H. Coquillard or the said Howe Machine Company, their duly authorized Agent or Assigns, in resuming such possession of said Machine. And should the above period be extended, this agreement shall continue to be binding.

JAMES HUNTER."

The declaration was in the usual form.

Pleas, non cepit: that the goods were defendant's; and leave and license.

The execution of the lease by the defendant was proved, and the plaintiff was called, who stated that he had possession of the machine in question before it was delivered to the canvassing agent for defendant: that he was responsible to the Howe Machine Company, a New York Company, for everything at Toronto; and that he had no property in the machines except as the Company's agent.

Upon this evidence the learned Judge nonsuited the plaintiff, holding that the plaintiff having no right of property in the machine he had personally no right to the possession: that no such right was created by the

contract : that the plaintiff's position in making the contract for his disclosed principal remained as before the contract, that of an agent without personal right or interest of any kind in the property ; and upon the same grounds he discharged the rule *nisi* to set aside the nonsuit.

The plaintiff thereupon appealed.

Feb. 5, 1875, *Hagel* for appellant. The plaintiff had such possession of the machine as to entitle him to bring this action : Consol. Stat. U. C. ch 29, sec. 1 ; *Cook v. Fowler*, 12 U. C. R. 568 ; *Nelson v. Cherrill*, 8 Bing. 316 ; *Robins v. May*, 11 A. & E. 213. The wording of the lease specifically gives the plaintiff this right of action, and the defendant is bound by his own agreement. There is no reason why the defendant should not have made the lease in its present form.

F. Osler, contra. The lease shews that the Company are the lessors. The plaintiff was only in the position of a servant of the Company. He cited *Story* on Agency, 7th ed., sec. 393, p. 463.

March 2, 1875, MORRISON, J., delivered the judgment of the Court.

The question arising on this appeal is whether, looking at the terms of the lease or instrument signed by the defendant, and under which he held on lease the sewing machine in question, the plaintiff can maintain this action ; and we are of opinion that he can. If the agreement had been made with the plaintiff, without any reference or mention in it of the Howe Machine Company, although it was well known and understood between the parties that the plaintiff was agent for the Company, it is clear from authority that he might sue in his own name, although it was competent for the Howe Machine Company to do so also.

Mr. *Story* in his work on Agency, 7th ed., sec. 160 *a*, in treating of the doctrine respecting written contracts made by agents as maintained in recent authorities, says : " that

if the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it."

And it is laid down in *Smith's Mercantile Law*, 8th ed., 156: "If an agent have transferred his master's property, under circumstances which give a right to recover it back, he may do so in his own name; though we have seen it may also be recovered in that of his principal." In such a case he sues as trustee for his principal.

We have to look to the terms of this agreement to ascertain what the parties really intended, and one test is to see who is to act in the performance of it, bearing in mind that it is made with an agent acting for a foreign principal.

Now, the defendant contracts, in default of his paying punctually the monthly rental, &c., that the plaintiff or the Howe Machine Company may resume possession of the machine without a previous demand; further, that he will pay the value of it, \$45, in the event of the machine not being returned to the plaintiff or the Company; and again, he waives all right of action for trespass, damages, or replevin, by reason of any action or process taken by the plaintiff or his Company in resuming possession of the machine.

It is, we think, very clear on the face of this agreement that the defendant contracted with the plaintiff, and that the intention of the parties was that the fulfilment of the defendant's contract might be enforced either in the name of the plaintiff or the Howe Machine Company, and that the plaintiff might repossess himself of the machine in the

event of noncompliance with the terms of the lease. We see no reason why a person may not make himself liable to either of two parties on account of the same interest, such as in this case. This alternative contract very probably was stipulated for by the plaintiff owing to the fact that the Howe Machine Company was a foreign corporation, so as to enable the plaintiff to take such a step as he has done here.

The defendant having contracted as he has done, and upon the faith of which he received on lease from the plaintiff a machine for which he, the plaintiff, was responsible to the Howe Machine Company, it does not lie in his mouth to dispute the validity of his own contract, or deny the right of the plaintiff to resume possession upon non-fulfilment of the conditions of the lease.

On the whole, we are of opinion that the plaintiff may maintain such an action as this, and that the learned Judge erred in directing a nonsuit. The appeal will therefore be allowed, and the rule *nisi* to set aside the nonsuit should be made absolute, and a new trial had without costs.

Appeal allowed.

GORDON V. WATEROUS ET AL.

Sale of goods—Warranty—Action for price—Evidence.

The plaintiff, the agent for an English firm, sold a number of files to defendants, to be paid for by a note at six months, and received from them an order, "Please ship," &c., describing the different sizes required, and the price. A subsequent order was given, as a recapitulation of the previous order. Neither contained any warranty, but it appeared that a verbal warranty of quality was given at the time of sale, that they should be as good as the files made by Jowitt, another maker. They were to be delivered in October following, but did not arrive until about the 1st December; and defendants having in the meantime purchased others, they were not opened for some time, and were not tested until March, when defendants, alleging that they did not fulfil the warranty, refused to pay for them. A correspondence took place, in which the plaintiff offered to take back a portion of the files, of a particular kind, but not the rest; and in May, having written to the plaintiff that they would do so, defendants sent the files to their broker in Montreal for sale. In an action for the price, defendants paid into Court the amount realized by this sale, with the invoice prices of the files which they had used, and set up the breach of warranty as a defence to any further claim. The learned Judge, who tried the case without a jury, found that, admitting the warranty, the defendants took an unreasonable time to test the goods: that the defendants should in reason have returned that portion which the plaintiff offered to take back; that the price realized in Montreal could not, under the circumstances, afford a fair criterion of value, by which to bind the plaintiff; and that in certain respects, specified these files were inferior to those made by Jowitt; and he rendered a verdict for the plaintiff for the price agreed upon.

The Court set aside the verdict, and entered a verdict for the defendants, holding: 1. That evidence of the verbal warranty was admissible, the orders for the goods not containing the whole contract, but being given on the faith of the previous verbal warranty; 2. That the weight of evidence shewed the files not to be first class, and inferior to those made by Jowitt; 3. That, looking at all the circumstances, the delay in testing the files was reasonable; 4. That defendants were not bound to return that portion of the files which the plaintiff was willing to take back; for the contract and order being an entire one, the defendants were entitled to have all the files contracted for or to reject all; 5. That there being no sufficient evidence to shew the actual value of the files, or that they were worth more than they sold for in Montreal, the plaintiff was not entitled to more than the sum paid into Court.

DECLARATION on the common count for goods sold and delivered.

Plea: except as to \$1,012.94, never indebted; and as to \$1,012.94, payment into Court.

The case was tried before Hughes, Co. J., sitting for Galt, J., without a jury, at the Goderich Fall Assizes, 1873.

From the plaintiff's evidence given at the trial, it appeared he was a wholesale merchant in Toronto, and dealt in Lockwood's files (a Sheffield firm) for some years, which file he introduced into Ontario; that in November, 1871, he had sold some \$30 or \$40 worth to defendants; that in July, 1872, he solicited the defendants to give him an order for the same files he had sold them in the previous fall; and that they gave him an order of the 10th July, 1872, produced, enumerating the different sizes, nearly 360 dozen—in amount \$1,543.

The order was as follows, and was addressed to plaintiff:—"Please ship at English prices 40 off, and 70 advance, of J. B. Sorley & Sons files, marked Lockwood Brothers," &c., "Sheffield, delivered in Hamilton." Then followed in columns, the kinds of files, sizes by numbers, and the quantities of each. The plaintiff produced another order more regular in its form, written underneath—"Recapitulation of order, July 10, '72," addressed to the plaintiff; and nothing more.

The files were to be supplied in October following, deliverable either in Toronto or Hamilton, the defendants paying freight from these points; they did not arrive as soon as the plaintiff expected; defendants got them about the 1st December; no written or other warranty, according to the plaintiff's evidence, was given or asked, but the plaintiff said he did give one on the first order in 1871; the files were as good as any going; that he gave no warranty as a matter of fact, saying, "Where a person buys articles once, I expect that when he buys again he knows what the articles are:" that he sold the same files to several persons, and that only a Mr. Nixon found fault with them, and he took them back: that the sample card he had was made up by taking a file out of different parcels, which card he had used for four years: that having received a letter from defendants he went to their place, but defendant Wilkes being absent nothing was done; that he then offered to take back the mill files, 94 dozen, as he could dispose of them; that as to the machine files, he said he could not dispose of them in a

dozen of years, except to machinists; and that he returned home, defendants saying they would not take them, and only kept them subject to plaintiff's order.

On cross-examination, he said that the warranty of the first parcel of files was that they were as good as any in the market: that he did not represent them as the best in the market, or as good as Jowitt's: that on the first occasion defendants said they were using Jowitt's, and did not wish to change, and they said the same at the time of the purchase in question; that on the first sale, being asked if the files did not turn out well what was to be done, he said he was good for the amount; but he did not recollect if he said so on the second purchase, or that they were first-rate files.

On the part of the defence the defendants' book-keeper was called, who stated, that the plaintiff came to defendants' works, and inquired how the sample of files turned out he had sold them last fall: that the witness referred him to Hall, the foreman: that the plaintiff and Hall returned to the office, when Hall said he had concluded to give the plaintiff an order, saying he would not do so unless they were fully warranted to be a first-class file, equal to Jowitt's, Hall saying it would be a very bad job if defendants had a large quantity of files on hand of a bad quality; that the plaintiff appeared indignant that his word should be doubted, and stated most distinctly that he warranted his Lockwood files to be equal to Jowitt's in every respect, and that he was selling according to a list of prices by the best makers: that the defendants were then on the eve of ordering their usual supply, and the witness knowing that files had risen in price, and that the plaintiff was offering at the old prices (doubting the quality), asked him how he could sell a first-class article at the old prices: that the plaintiff replied that he was advised by the house in England which he represented to sell the files at the old prices for a certain length of time, and so, the plaintiff said, he wanted the order as soon as possible, so as to get it in time, further saying that the price was no criterion of the

quality, that they were to be a first-rate file: that he went to one of the defendants, and made him acquainted with the facts, who said, if they were represented to be a first-class file, to give the order: that he then wrote the particulars of the order on the strength of plaintiff's warranty; and in the printed catalogue of the defendants (which was produced) the various kinds of Lockwood files (plaintiff's) were entered, and headed "good as Jowitt's," being so printed founded on the warranty given by plaintiff: that the files in question were not opened for some time after their arrival at defendants', as they did not require then to use them, for by reason of the non-arrival of plaintiff's files, and doubting if they would arrive, the defendants had purchased files of Jowitt's: that he wrote to the plaintiff about them: that the plaintiff came to Brantford: that he asked him what about the files, telling him that they could not use them, and desiring him to take them back; he said he would not do so; that the foreman brought a sample to the plaintiff to shew him how worthless they were; that the plaintiff refused to take them, saying that he did not warrant them, and requiring payment: that he told the plaintiff, in the absence of defendant Wilkes he could make no arrangement except to give him back the files; the files were to be paid by a note at six months, when defendants were satisfied they had got value for their money.

Hall, the defendants' foreman for 25 years, stated: that he saw the plaintiff in the fall of 1871, with files, which he said he wished to introduce there through the establishment of defendants', who employed from 150 to 200 men: that he spoke of them as a first-class file; that defendants were then using Jowitt's, which are first-class files: that they took \$15 to \$20 worth from the plaintiff as a sample; that on the 2nd July, 1872, the plaintiff called, and asked how the sample turned out; witness told him they were a very good file, when the plaintiff asked witness if he would give him an order; witness said that he was well satisfied with Jowitt's, and did not feel inclined to change: that the plaintiff pressed witness, saying he wished to cultivate a business by intro-

ducing his files : that witness being told by defendants' office that if he wished he might give an order if he was satisfied with the quality, he told the plaintiff that he would be satisfied if they were as good a file as Jowitt's : and that the plaintiff replied, "I tell you the files I want to sell you are a first-class file, as good as Jowitt's ;" witness said, if he gave that assurance he would think it over ; plaintiff said they were cheaper ; that witness replied he had nothing to do with the price, that he could only have a first-class file in their business, and that witness remarked it would be a bad job if the files did not turn out good, on account of the inconvenience they would give to defendants : that the plaintiff said if they were not good, his standing and position were such that they might come on him : that he made out a list, shewing him a sample of Jowitt's then, as he did also in the fall of 1871 ; and witness said, that if the plaintiff had not made the representations he did, and if he had not found the first specimen good, he would not have taken them : that the files were to be delivered to defendants in September : that they did not arrive till December : that none of the files were tested until March, and on account of the delay in delivering, the defendants got other files in the meantime, and plaintiff's were not used until a person came to buy some. This witness testified to the inferiority of the files (producing a fair sample of them in Court) to Jowitt's.

A Mr. *Taylor*, a wholesale hardware merchant in Montreal, testified that he dealt with the plaintiff : that during the past summer he offered to sell him files of Lockwood's make, enumerating their sizes and quantities : that the plaintiff said he had imported them for defendants, who declined to take them, the reason given for defendants doing so, was that they were not equal to the representations, which were, that they were to be equal to Jowitt's : that he had represented them to be first-class files. This witness said that Lockwood's files were not so well known in the market as Jowitt's, and the latter had a reputation, and are a recognized standard of quality : that files are a very particular

article of commerce, and one cull file in a parcel would affect the whole quantity : that he asked the plaintiff if he gave a guarantee as to quality, and if it was included in the order ; he said no, it was verbal.

On cross-examination, he said that he dealt in Frith & Sons' files ; that he did not know Lockwood's ; a small fault in Jowitt's would not affect their reputation, but it would those of another maker : that the plaintiff told witness that he had represented them equal to Jowitt's. This witness was of opinion that three or four months was an unreasonable time to keep the files if they were not according to order.

John Bishop, a hardware merchant in Brantford, saw the plaintiff there selling files ; his samples were superior goods ; he told witness he sold a good bill to defendants ; that he would sell them on a warranty, as he was introducing them into Canada : that as soon as he opened a parcel of defendants he pronounced them culls, and inferior to the sample card ; that they were not a first-class file, and were inferior to Jowitt's ; that he examined six or seven, and did not find a perfect file.

C. E. Torrance, a broker in Montreal, testified that he received a consignment of files, (those in question), for sale from defendants ; that he offered them to the trade, and sold them on the 13th September for \$938 45, less \$53 80 freight, brokerage, &c., net \$884 65 : that he made special efforts, which he detailed, to sell them : that the prices had slightly gone down between June and September ; that Lockwood files are not known in the trade, and do not rank as high as Jowitt's, which are well known.

A number of witnesses were examined on both sides as to the quality of the files in question, and files of the same maker sold by the plaintiff to others, and the relative character of the Lockwood file compared with Jowitt's. It is not necessary to refer in detail to this evidence.

As to the sale of the file in Montreal *Mr. Wilkes* testified, it was the best market for the sale of so large a quantity ; and that the market there ruled the prices of iron in the country.

The following correspondence between the parties was put in at the trial:—

1. A note from plaintiff, 1st March, 1873, asking for a note for the amount, which he had sent for signature.

2. Letter in reply, 11th March, from defendants:—"Your letters were duly received, and we should have sent ere this your note, but we were waiting that files were in some measure tested. One or two parties have returned the files, stating they were too soft for mill use, that one of Jowitt's was worth three of them, &c. In each case we have given them other sizes to try, as your guarantee was, that they were every respect equal to Jowitt's files. We do not at present feel like sending note. Will advise you result of thorough trial at our shops, and from other parties."

3. March 29th, defendants wrote to plaintiff: "Enclosed we hand you report of files from foreman. You will remember your guarantee was, that files should be in every way equal to Jowitt's. We can't use them. We can't sell them. What is to be done? Better come down and arrange."

As appeared in the evidence, the plaintiff went to Brantford, but defendant Wilkes being absent, no arrangement was made.

4. On 16th April defendants wrote: "Our Mr. Wilkes has returned, and he is of same opinion as Mr. Waterous, viz., that it is folly for us to keep a poor file. We have therefore no other proposition to make you, than that you take the files back; we will case them up on receipt of your order where to ship them. We don't care to give them another trial, feeling satisfied as to their quality, but will do so if you wish it. Waiting your reply, with instructions when to ship."

5. On the 29th April defendants wrote plaintiff: "Since writing you 16th inst. we have heard nothing from you. What decision have you come to? We have decided that the files will not suit us in any respect; that they are not what we ordered, or what were sold to us. We bought files warranted by you to be equal to Jowitt's. The files

are very inferior, and too poor for us to attempt to use them. We should ask damages from you, but for sake of settlement, we, without prejudice, offer to return you all we have; and the few we have used we shall pay you for at prices invoiced. Waiting your immediate reply, as files are in our way."

6. On 3rd May the plaintiff wrote: "Yours of 29th ult. received. I can say nothing till I receive my instructions, and I will then notify how I will proceed."

7. Defendants wrote, 6th March: "Not hearing from you we have decided to re-cask the files, and send them to our broker in Montreal to dispose of. We will still hold them 10 days waiting your reply. Should we be forced to sell them, any loss sustained we shall look to you to make good, all brokerage and freight being chargeable to the files."

8. On the 13th defendants write: "We wrote you on the 6th inst., stating we would send the inferior files sent us to our broker in Montreal to sell for us. Any loss that shall be sustained we shall look to you to make good, also all brokerage and freight charges will be charged to files. Fearing you might not have received the letter, we write you again to make sure, and will now wait a few days before sending them, to give you time to reply, say till the 17th inst."

9. On 15th May plaintiff replies: "I am in receipt of yours of 13th inst. I have been waiting for my orders. The Messrs. Lockwood Bros. say they cannot understand why the files you have received were *bad*, as they send the same files to every part of the world, and no complaints. They are willing to sacrifice a little in price to get you to use the files. I have orders every day for mill saw files. I would willingly take them, but the machinists' files is no use to me. Hoping you will soon see fit to come to an arrangement, and pay for the files, as they are past due. I can get fifty testimonials, the files being good files, if it is required. Waiting your reply."

At the close of the case, the learned Judge stated that, in his opinion, there was no proof of what might be consid-

ered a legal warranty: that there was proof of a verbal warranty—that the weight of evidence was on the part of the defendants in this respect: that supposing the files were warranted, he thought the time the defendants took to repudiate the sale an unreasonable length of time to test the goods: that he thought the defendants, not having advanced more than the price of the carriage, which was more than covered by the amount of files used and sold, the defendants had no necessity or right to sell the whole of the files remaining unsold after they had determined not to pay for them; much less was it necessary or proper for them to send the mill saw files to a long distance, like Montreal, to sell them at a lesser price than could be procured for them in Upper Canada, or the original price: that he thought the reasonable and proper course would have been for the defendants to have allowed the plaintiff at least to have taken back the mill saw files, and left any question there might be open between them to future negotiations, or the fate of a suit, as to the rest: that the sending the goods to Montreal, and authorizing them to be sold, was a proceeding which could not reasonably be set up here as a criterion of value, or by which the plaintiff was in any way bound; and that the sending them there was an act of the defendants not justified by the state of the case: that there existed no necessity for selling the goods at all either at Montreal or anywhere else: that he found, supposing there was a legal warranty, that the goods were inferior to Jowitt's files in respect of the value of the materials, in respect of the materials of which the mill saw files were made; but with respect to the large square files, none of Jowitt's were produced for comparison, and the general tenor of the evidence (apart from comparison) left the matter in doubt as to any difference between them, except as to the materials of which the mill saw file were made; of the small square files there were specimens produced of both Jowitt's and Lockwood's, and the latter were inferior in shape to Jowitt's. The learned Judge reserved leave to either party to move against

his finding, if the Court above should think he was wrong either upon the law or facts; and he entered a verdict for the plaintiff for \$568 20.

During Michaelmas term, November 19, 1873, *Hardy* obtained a rule *nisi* to set aside the verdict, and to enter a verdict for the defendants, pursuant to leave reserved, and under the Law Reform Amendment Act, on the ground that the learned Judge should have entered a verdict for the defendants, the verdict being against law and evidence: that the learned Judge took an erroneous view of the law in holding that there was no proof of a legal warranty, and that the evidence given of warranty was not admissible; and in holding, as a matter of law or fact, that the defendants were unreasonably long in notifying the plaintiff of objections to the files, or in repudiating the contract; and in holding that the defendants were not entitled to re-sell the files, at all events the mill saw files, nor to send them, or any of them, to Montreal for sale, and that they should have returned the mill saw files to the plaintiff.

In Easter term, June 2, 1874, *Robinson*, Q.C., shewed cause. The learned Judge who tried the case found that there was no proof of legal warranty. This turned on whether evidence of a verbal warranty was sufficient, and if so, was there such evidence? Whether there was or not, depended on the order given—a written order dated 10th July, 1872, which, it is contended, contained the whole terms of the agreement as to quality: See *Benjamin* on Sales, 2nd ed., 506, 507; *Allen v. Pink*, 4 M. & W. 140; *Parsons* on Contracts, 5th ed., vol. i., 548, 583; *Reed v. Wood*, 9 Vermont 285; *Bond v. Clark*, 35 Vermont 577; *Hilliard* on Sales, 3rd ed., 351; *Rendell v. Roads*, 10 Curtis 90; *Gardiner v. Gray*, 4 Camp. 144; *Tye v. Fynmore*, 3 Camp. 462. These cases also apply to the point that defendants were unreasonably long in notifying the plaintiff that they repudiated the sale. On this point see also *Benjamin* on Sales, 2nd ed.,

750, 753; *Street v. Blay*, 2 B. & Ad. 456, 464; *Allen v. Cameron*, 1 Cr. & M. 832, 838; *Hilliard on Sales*, 3rd ed., 361, citing *Muller v. Eno*, 14 N. Y. 597; *Fisher v. Samuda*, 1 Camp. 190; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons on Contracts*, vol. i., 593; *Craig v. Miller*, 22 C. P. 348. The verdict is right on the evidence.

The defendants' evidence as to Jowitt's files was wholly unreliable. Their witnesses stated that they had never seen a Jowitt file imperfect in shape. The plaintiff thereupon obtained several parcels of these files from a hardware shop in Goderich, selected indifferently, which were examined in Court, and these witnesses had to admit that they were as imperfect as those of the files in question to which they objected. All the evidence shewed that these files were well worth the price charged.

Harrison, Q.C., with him *Hardy*, supported the rule. The plaintiff's files were evidently not much known, and were therefore likely to have been warranted in order to obtain a sale. The order was not the contract, but there was clear proof of a warranty apart from it. It was for the plaintiff to have objected to the sale when the defendants threatened to sell the files. The defendants were entitled to succeed on the evidence. They relied on *Lockett v. Nicklin*, 2 Ex. 93; *Chapman v. Callis*, 2 F. & F. 16, S. C. 9 C. B. N. S. 769; *Randall v. Thornton*, 43 Maine 226; *Tuttle v. Brown*, 4 Gray 457; *Benjamin on Sales*, 2nd ed., 151, 155. If there is no evidence of express warranty, the law would imply a warranty; it would be presumed that the files should be reasonably equal to our wants, of which the plaintiff was aware: *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 M. & G. 279; *Shepherd v. Pybus*, 3 M. & G. 868; *Bigge v. Parkinson*, 7 H. & N. 955, 961; *Mallan v. Radloff*, 17 C. B. N. S. 588; *Jones v. Just*, L. R. 3 Q. B. 197. On the question of notifying the plaintiff, see *Fielder v. Starkin*, 1 H. Bl. 17; *Buchanan v. Parnshaw*, 2 T. R. 745; *Basten v. Butter*, 7 East 479; *Mondel v. Steel*, 8 M. & W. 858; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Powell v. Horton*, 3 Scott 110;

Loder v. Kekule, 3 C. B. N. S. 128 ; *Hunt v. Silk*, 5 East 449 ; *Blackburn v. Smith*, 2 Ex. 783.

March 2, 1875, MORRISON, J., delivered the judgment of the Court.

The principal points we have to consider in this case are, whether the sale of the files in question was made on the guarantee contended for by the defendants ; and if so, were the files sent to the defendants equal in quality as guaranteed ?

As to the warranty, we think there is abundant evidence to establish that point in favour of the defendants. We see no ground for entertaining any doubt on that point. Independent of the verbal testimony, the correspondence shews that while the defendants were affirming and reiterating the guarantee, the plaintiff did not deny or repudiate that such a guarantee was given.

It was, however, contended that no evidence of a parol warranty was admissible, for the written orders or memoranda given by the defendants contained the whole contract ; but we think it is quite apparent that they were merely memoranda given after the purchase was made, on the faith of the guarantee, for the purpose of shewing the quantities, kind, and sizes of files of the quality agreed upon, and required by the defendants.

As said by Lord Abinger, C. B., in *Allen v. Pink*, 4 M. & W. 144, which was a case of a verbal warranty, at p. 144: "The general principle stated by Mr. Byles is quite true, 'that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract' ; but the principle does not apply here ; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced in writing by the defendant ; the contract is first concluded by parol, and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself."

There, the memorandum signed by the defendant was "Bought of G. Pink, a horse, for the sum of £7 2s. 6d.," parol evidence being adduced of the warranty being given before it was signed.

So here, after the negotiations terminated, and the contract made, this order or memorandum was given as to the size, &c., of the files; the plaintiff, in all probability, saying, "Give me a memorandum or order, shewing the quantities and sizes." There is no pretence here for saying that the parties had agreed to reduce the terms of their contract into writing.

Affirmations as to quality, which are made pending the negotiations for sale with a view to procure a sale, and having that effect, are regarded as warranties: *Cave v. Coleman*, 3 M. & R. 2; *Smith*, Merc. Law, 8th ed., 510; *Parsons on Contracts*, 5th ed., vol. i., 583, note *o*.

And in *Percival v. Oldacre*, 18 C. B. N. S. 398, a conversation which passed between the plaintiff and defendant before there was any negotiation for the sale of a horse was contended not to amount to a warranty, but the Court held that such a representation was part of the contract, and evidence of a warranty.

Then, as to the question whether the files were, in point of quality, according to the warranty. After reading over all the evidence given by some twenty witnesses, the evidence, in our judgment, preponderates greatly in favour of the defendants' contention, and that the files were not first-class files, and not equal but inferior to those called Jowitt's.

These two points being found against the plaintiff, then comes the question, what amount is the plaintiff entitled to recover in this action.

In *Starkie on Evidence*, 3rd ed., vol. iii., page 1210, it is laid down, "Where the article of sale is *warranted*, it seems that the vendee is entitled to prove the inferiority and the breach of the warranty in diminution of the damages, although a specific price has been agreed for. This is not open to the objection that the defendant ought to have

rescinded the contract *in toto*, for, from the very nature of the contract of warranty, he has a right to keep the goods, and recover damages for the breach of warranty, and therefore it is just, as well as convenient, that he should be permitted to prove the breach of warranty in the first instance, in diminution of damages."

The same principle is laid down in *Smith's Merc. Law*. 8th ed., 511.

And in *Poulton v. Lattimore*, 9 B. & C. 259, Littledale, J., in giving judgment, said, at p. 265: "I am of opinion, that where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for the breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, or in answer to the action, if the goods be of no value. * * The not giving notice, indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale. And if that be so, it is reasonable and just, when an action is brought by the seller, to recover the price or value of the goods, that the buyer should be at liberty to shew the breach of warranty in defence of the action. Then the only question is, was the seller entitled to recover anything? There may be cases where a buyer may keep goods, which, although they do not correspond with the warranty, may be worth something, and the seller may be entitled to recover."

And see the judgment of Parke, J., to a like effect. And see *Street v. Blay*, 2 B. & Ad. 462, Lord Tenterden's judgment.

Parke, B., in giving judgment in *Mondel v. Steel*, 8 M. & W. 858, at p. 871, says: "It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods

agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off by a proceeding of the nature of a cross action the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more."

It was, however, also contended that, assuming a warranty proved, the defendants not having objected to the files for so long a period after they received them, they were not justified in repudiating the sale; and the learned Judge in his finding seemed to lay some stress on the fact.

Were it necessary to consider this point, we should say, looking at all the circumstances, the cause assigned for the delay by the defendants' witnesses was a reasonable one, viz., that the plaintiff's files not having arrived for months after the appointed time, and it being uncertain when they would arrive, the defendants purchased other files in the meantime for their business, and so no immediate necessity arose for their opening out or using the files in question.

If these defendants were suing the plaintiff for a breach of the warranty, I could see the reasonableness of complaining of the delay, and setting it up as a defence, although I find no case going so far as to say that delay would be conclusive against the buyer.

In *Fielder v. Starkin*, 1 H. Bl. 17, Lord Loughborough, in giving judgment, says, at p. 19: "If a horse which is warranted sound at the time of sale, be proved to have been *at that time unsound*, it is not necessary that he should be *returned to the seller*. No length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against

the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult."

And in *Pateshall v. Tranter*, 3 A. & E. 103, that decision was upheld.

And so in *Yates v. Pym*, 6 Taunt. 445, where witnesses were called to shew that if the purchaser did not object within a reasonable time, he was precluded from raising any claim for the defect in the goods, which in that case was bacon, Gibbs, C. J., said, at p. 446: The plaintiff's witnesses stated, "that if the buyer does not examine it by a certain day, and point out the defect before a certain time, he can never afterwards object, but must take it at the price agreed on, though it be putrid. This can never be: it would lead to great mischief. If a purchaser does not object to the quality in a reasonable time, a strong use may be made of that circumstance, but the use is, that a conclusion arises, that the injury has occurred since the sale. I cannot think that any custom of trade can be admissible to prove that proposition now contended for."

And see *Poulton v. Lattimore*, above cited, to the like effect.

In the case before us the time could not have injured the quality of the files.

It was also pressed on us that the defendants ought to have returned to the plaintiff the portion of the files which he was willing to take back. We cannot see that he was entitled to select any particular portion, or that the defendants were under any obligation to accede to his proposition. It might have been better if they had assented. The contract and order was an entire one, and the defendants would not have been obliged to accept or pay for any particular portion unless all the articles ordered were furnished according to the terms agreed upon.

As said by Lord Ellenborough, in *Champion v. Short*, 1 Camp. 53, at p. 54: "Where several articles are ordered at the same time, it does not follow, although there may be a separate price fixed for each, that they do not form one

gross contract. I may wish to have articles A., B., C., and D., all of different sorts, and of different values; but without having every one of them as I direct, the rest may be useless to me. I therefore bargain for them jointly."

The defendants being entitled to set up the inferior quality of the files in reduction of the plaintiff's right to recover the alleged contract price, we have next to say, assuming the functions of a jury, whether the defendants have paid into Court a sufficient sum. I must say it is not easy to arrive at a satisfactory conclusion upon this point. The plaintiff gave no evidence of the value of the files, assuming there was no guarantee. Nor does it even appear by his evidence what prices were agreed on, and none were specified in the order mentioning the sizes, &c. All that appears is, that he sold to the amount of \$1543.

How that value is arrived at does not appear. All that we may assume is, that at the trial the defendants did not object to that amount if the files had corresponded with the guarantee contended for by them.

The plaintiff called many witnesses to speak to the quality of the files, but no witness was asked to put a value on the mill saw files, or any of the files in question.

The defendants, resting their defence upon the allegation, that as they were not according to their contract, and could not be used by them, and as the plaintiff would not take them back, they then sent them to the best market to be sold, and to a broker who took special care to obtain the best price to be had for them. And the defendants paid into Court \$1012 94, as all they were entitled to pay, and which was made up as follows: The amount realized in Montreal, \$938 48; files used by defendants, \$149 81, total, \$1088 29; deducting brokerage, \$23 47; freight to Brantford, \$11 57; to Montreal, \$28 25; storage, &c. \$2 06; leaving, \$1012 94.

It is evident from the plaintiff's testimony that it would be difficult to find a market for so large a parcel of these files, and that it would take an indefinite time to dispose of them in lots. It was not suggested that the Montreal

market was not a fair or good one, or that a better could be found ; and we may fairly assume that as the plaintiff was as familiar with, and must have known the markets, he could have shewn whether such a sale in Montreal did not afford a criterion of fair value. And in considering this point, it must be borne in mind that it was not until after repeated offers by the defendants to return the files, or to send them where the plaintiff might direct, and after ample opportunity was given to the plaintiff in this respect, that the defendants adopted the course they did.

This action is the ordinary one for goods sold and delivered, and it was quite competent for the plaintiff to have shewn that the files in question were worth more than they realized, or that they could have been sold to better advantage.

The plaintiff cannot complain that he was not aware of the defence set up, as he called some ten witnesses to rebut it, and so he ought to have been prepared, if he failed to establish his case, and that the defendants proved the alleged warranty, and that the files did not correspond therewith, to shew the value of the particular files furnished the defendants.

On the whole, we cannot say that the plaintiff is entitled to receive more than the money paid into Court ; it is the amount realized by the sale of the files ; it may be said that they would or might have produced more under other circumstances, which do not appear.

In a dispute of this nature, where one of the parties must suffer loss, the one who is found to have made default, and so creates the difficulty, has not much ground of complaint, if, in the absence of evidence, an unfavourable view is taken of his case, as here, where he has omitted to produce testimony to shew that he ought not to suffer the loss he complains of.

Rule absolute.

CASSIDY V. TERENCE INGOLDSBY AND PAUL INGOLDSBY.

Ejectment—Judgment—Estoppel—Privity.

IN ejectment, against two defendants, where the plaintiff claimed under a conveyance from H., the defendants put in an exemplification of a judgment recovered by one defendant, in an action against two sons of H. for trespass to the same land, in which defendants pleaded that it was the freehold of H., under whom they entered; but there was no evidence to connect H. with the trespass or the suit. *Held*, that the plaintiff was not estopped by such judgment.

EJECTMENT for an irregular strip of land, being part of the east half of the west half of lot 18 in the sixth concession of Camden, lying along the easterly boundary of the lot.

The plaintiff claimed under a conveyance from Hannah Paul, devisee of her husband, James Paul, who had purchased the east half of the west half in question at a sheriff's sale. It was sold to James Paul under a *Ven. Ex.* against Edward Hirsch, the assignee of the patentee, Cepha Miller. The defendants claimed by length of possession.

The cause was tried at Napanee, at the Spring Assizes, 1874, before Galt, J., without a jury.

At the trial it clearly appeared that the defendants had been in possession for thirty years, but the patent for the land had only issued on the 23rd January, 1868.

An exemplification was put in of a judgment in favour of defendant Terence Ingoldsby, recovered on the 30th May, 1871, in a suit brought, on the 5th December, 1870, by him against William Paul and Stewart Paul, sons of Mrs. Hannah Paul, for trespass in moving the fence which separated the land in dispute from Mrs. Paul's land, but there was no evidence to connect Mrs. Paul with the trespass or the suit. The declaration in that suit was for trespass to the east half of the lot 18, and the defendants, among other pleas, pleaded, as to so much of the land as is within the line dividing the east half of the lot from the west half, that it was the freehold of Hannah Paul, and that defendants entered as her servants. The jury found that it was not her free-

hold. The reception of the exemplification was objected to at the trial, but the objection was overruled. There was evidence also given as to surveys of the land, which is not necessary to this report.

The learned Judge found: "That the defendants are in possession of the land claimed in the declaration * * and that such possession had existed for thirty years; and that the same was taken with the assent of the then occupier of the west half of the lot. I find that the patent did not issue for the east half of the west half until 23rd January, 1868, and I rule in consequence that the Statute of Limitations does not apply. I find that the plaintiff claims as assignee of Mrs. Paul, and I hold that he is bound by the estoppel created by the judgment in the suit of *Ingolsby v. Paul* * * I enter a verdict for defendants, and reserve leave to the plaintiff to move under the Law Reform Act."

In Easter Term last, May 20, 1874, *Wallbridge*, Q.C., obtained a rule *nisi* to set aside the verdict for defendant and enter a verdict for the plaintiff, pursuant to leave reserved.

In this term, February 6, 1875, *Robinson*, Q. C., shewed cause. He cited, as to the estoppel: *Freeman* on Judgments, sec. 164; *Pico v. Webster*, 12 Cal. 140; *Lawrence v. Ware*, 37 Ala. 553; *Bigelow* on Estoppel, 61, 62; but admitted that the authorities seemed not to support the estoppel against Mrs. Paul's title by a judgment against her two sons, in a suit to which she was not shewn to be privy.

Bethune, contra, was not called on.

March 2, 1875. RICHARDS, C. J., delivered the judgment of the Court.

The only point raised on the argument was whether the defendants could set up as an estoppel the judgment in favour of defendant Terence Ingolsby recovered against plaintiff's tenants in an action in relation to the *locus in quo*.

It was not shewn that the plaintiff was any party to that suit, nor the nature of the tenancy.

In *Tickle v. Brown*, 4 A. & E. 369; Patteson, J., said, at p. 378: "Before the statute (relating to prescription), the acts of tenants might be evidence against the reversioners, yet the naked declarations were not so."

In *Scholes v. Chadwick*, 2 Moo. & Rob. 507, it was held that the declaration of a former occupier of defendant's land was not admissible against the latter. In argument, it was said that, before the Prescription Act, "even the acts of the occupier, if he had only an estate from year to year, did not bind the reversioner; *a fortiori* it cannot be maintained his mere declarations should have that effect."

On the other side it was urged "the tenant is placed in possession by the reversioner, and represents the reversioner; and what he says in derogation of his own rights and interest at the time must be admissible evidence, though of course the weight due to it may be more or less."

Cresswell, J., rejected the evidence.

But if admissible in evidence, one fails to see how the recovery against the defendants could be set up in bar against the landlord. He is no party to the suit and may know nothing of it.

If the landlord had come in to defend with the tenants, as landlord in right of the tenant, and that defence fails, the landlord must fail also: *Doe d. Mee v. Lightfoot*, 4 A. & E. 784.

Mr. Robinson referred us to no authority in his favour, and the doctrine laid down in *Freeman* on Judgments, sec. 164, and *Bigelow* on Estoppel, 70, seemed to be against him.

As to the distinction between estoppel and conclusive evidence, and when estoppel set up by pleadings, see *Conradi v. Conradi*, L. R. 1 P. & D. 514; *Spencer v. Williams*, L. R. 2 P. & D. 230. The judgment bars when the parties are the same or when they claim under the original parties; when they do not so claim, though privies in blood, they are not barred.

Whittaker et al. v. Jackson, 2 H. & C. 926, is a case when the devisor of the plaintiff had been sued by the husband of the female defendant in trespass, and had pleaded that the land at the time of committing the trespasses was his land, and the jury found for the defendant on the plea. The Court held the judgment on this plea estopped the defendant in that action from shewing that at the time of the trespass the land was not the land of plaintiff's devisor.

Pigott, B., said: "The question is what was the land really in litigation in the former action, and what land did the jury there find to be the land of the defendant?"

The dedication of a road to the public by a tenant is good only for his own term; it does not bind the reversioner: *Wood v. Veal*, 5 B. & Al. 454; *Harper v. Charlesworth*, 4 B. & C. 574, 591; *Rex v. Barr*, 4 Camp. 16.

Rule absolute.

REGINA V. CRONIN.

Arson—Sufficiency of indictment—Amendment of count—"The merits of the case"—32-33 Vic., ch. 24, sec. 71.

Defendant was charged with having set fire to a building, the property of one J. H., "with intent to defraud." The case opened by the Crown was that the prisoner intended to defraud several insurance companies, but the legal proof of the policies was wanting, and an amendment was allowed by striking out the words with "intent to defraud." The evidence shewed that different persons were interested as mortgagees of the building, a large hotel, and J. H., who was the prisoner's brother-in-law, as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested, and they found a verdict of guilty:—*Held*, that the amendment was authorized and proper, and that the conviction was warranted by the evidence.

The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shewn on the trial.

"The merits of the case," with reference to amendments, under 32-33 Vic., ch. 29, sec. 71, D., means the justice of the case as regards the guilt or innocence of the prisoner; and "his defence on such merits" means a substantial, and not a formal or technical defence.

CROWN case reserved from the General Sessions of Elgin, of December, 1874.

The prisoner was indicted, for that he, on the 11th of October, A.D. 1874, at the Town of St. Thomas, in the County of Elgin, did feloniously and maliciously set fire to a certain building, that is to say, a house, known as the "Dufferin House," the property of one John Hanley, *with intent to defraud*.

The learned Judge stated the case as follows:—

"There were two other counts in the indictment which were abandoned by the prosecution.

"The case opened by the Crown was, that the accused set fire to the building with intent to defraud various insurance companies, who had taken fire risks thereon; but the County Attorney, prosecuting for the Crown, failed to sustain such, his opening by the evidence, inasmuch as the policies of insurance were not produced; and he endeavored to supply the proof by secondary evidence, which on objection I refused to allow, unless the non-production of the policies was accounted for. It was, however, shewn that John Hanley mentioned in the indictment owned the house, consisting of a large hotel built by him, which proved to be an unprofitable investment: that it had remained unoccupied for some time, and was at the time of the fire advertised and offered for sale, and was to have been sold on the Tuesday following the day (Sunday) of the fire. It was also shewn by the defence that John Hanley's interest in the building was \$2,000, over and above incumbrances. There was ample evidence to go to the jury of the setting fire to the building by the accused, (who was proved to be the brother-in-law of John Hanley, and to have, at the time of the fire, been living in the same dwelling house with Hanley), in another part of the town. At the close of the evidence for the prosecution, Mr. E. Horton, for the defendant, contended there should have been an acquittal ordered by the Court, as there was no proof of an intent to defraud, as alleged. The County Attorney then asked to have the allegation in the indictment amended by substituting the word "injure" for "defraud," which, after some hesitation, I allowed, by striking out the words "with intent to defraud" altogether, so as to leave the indictment in the form given in the Dominion Statute, 1869, 32-33 Vic., ch. 29, page 291; and I endorsed an order on the back of the indictment, as follows:—

"It is ordered that the within indictment be amended in the first count, by striking out the words "with intent to defraud."

"D. J. HUGHES, J. P.,

"Chairman.

"9th December, 1874."

"Mr. Horton, for the accused, objected to the amendment, on the ground that the power of the Court to amend does not extend so far.

"The case then went to the jury, and evidence was given for the defence, whereby it was proved, amongst other things, that the property was mortgaged by the said John Hanley: that he had an interest in the Dufferin House at the time of the fire over and above all incumbrances existing on it, to the extent of \$2,000, and the premises had been advertised to be sold by the mortgagees to pay off the incumbrances.

"I left it to the jury to say, as a matter of fact: 1. Whether the accused set fire to the building at all; and if so, then 2. If he had done it with the intent to do an injury to some one: that if the intent was to injure some one else, and the result had been to injure John Hanley mentioned in the indictment, they should convict the accused; and that it was for the jury to say whether there was an intent to injure any one; and if they found there was, then the law made it an unlawful act and felony, and it would raise the presumption of intention, *i. e.*, that it was maliciously done; and 3. That in this case there was proof that different people were interested as mortgagees, and John Hanley as the owner of the equity of redemption, which the fire rendered valueless, for they had no proof that the building was insured, and the land on which it stood was proved to be not worth the amount covered by the mortgages, after the fire; and that, if the jury were satisfied the building was burned by the act of the prisoner, and that he had the intention to injure any of those interested, they should convict him of the crime, for what was an injury to the mortgagees must necessarily be an injury to John Hanley; but that if they were satisfied he had no such intent to injure, they should acquit the accused altogether.

"The jury found a verdict of guilty, whereupon I sentenced the prisoner to an imprisonment of seven years in the penitentiary. I nevertheless, under the provisions of the Act respecting the reservation of Points of Law in

Criminal Cases, reserved for the consideration and judgment of the Justices of the Court of Queen's Bench aforesaid, the question whether or not the said Court of General Sessions of the Peace had the right to make the said amendment, and whether or not the prisoner was properly convicted under the circumstances hereinbefore set forth. And pursuant to the statute in such case made and provided, I respectfully pray the judgment of the said Court of Queen's Bench hereupon."

During this term, February 2, 1875, the case was argued. *Colin Macdougall* for the prisoner. The indictment is founded on 32-33 Vic., ch. 22, sec. 3, D., and the words struck out by the amendment were therefore material and should have been proved. As it stands, the crime laid ceases to be one within the third section referred to, and it does not come within the seventh section. The judge had no right to make the amendment. The question is a substantial one and not a technical one. He cited *Regina v. Bryans*, 12 C. P. 161; *Regina v. Labadie*, 32 U. C. R. 429; *Regina v. Paice*, 1 C. & K. 73; *Regina v. Dowlin*, 5 T. R. 317; *Regina v. Manning*, L. R. 1 C. C. R. 338; *Regina v. Newbould*, *Ib.* 344.

K. Mackenzie, Q. C., for the Crown. The law presumes that a man intends the natural consequences of his act.

When a man sets fire to his own house, the intent must be alleged; not so when he sets fire to the house of another. The Courts are inclined to grant amendments with more liberality now than they did formerly, and the cases show that the amendment was rightly made: *Regina v. Farrington*, R. & R. 207; *Regina v. Jackson*, 19 C. P. 280; *Regina v. Newbould*, L. R. 1 C. C. R. 344.

March 2, 1875. RICHARDS, C. J., delivered the judgment of the Court.

The term "merits of the case," applied to criminal proceedings, must mean the justice of the case in reference to the guilt or innocence of the prisoner of the offence with which he is charged; and then as to his defence

on the merits being prejudiced by an amendment, this means a substantial and not a formal or technical defence to the charge.

Amendments, under the statute, in criminal cases, were at first sparingly made, but in later cases the Judges have held they should have a wide construction.

In *Regina v. Welton*, 9 Cox, C.C., 297, Byles, J., said: "A statute of this kind should have a wide construction, and I shall not interpret it in favour of technical strictness."

As to the interpretation of the words "not material to the merits of the case," see *dicta* of Pollock, C. B., in *Pacific Steam Navigation Co. v. Lewis*, 16 M. & W. 783, and of Parke and Rolfe, B.B.

On an indictment charging the prisoner with perjury, committed on the trial of an indictment for setting fire to a certain *barn*, where the indictment was for setting fire to a certain stack of barley, the words "stack of corn" was allowed to be inserted instead of *barn*.

Many of the cases are referred to in *Russell on Crimes*, by *Greaves*, 4th ed., vol. iii., p. 325.

Since the passing of our Consol. Stat. C., ch. 99, sec. 78, similar provisions being contained in the Imperial statute 14-15 Vic. ch. 100, amendments have been frequently made in indictments on the trial of parties charged with felony, and there seems no doubt as to the authority to make these amendments; and the cases to which I have referred shew that they should be made when a prisoner is not prejudiced as to his defence, such defence not being a mere formal or technical one.

In *Regina v. Newbould and Holdsworth*, L. R. 1 C. C. 344, where in the indictment the prisoner was charged with setting fire to a shop belonging to and then being in the possession of Newbould, with intent thereby to injure, it was held that the averment of property in the prisoner was, under the statute, an immaterial averment, which need not be proved, and that an intent to injure another person as owner might be proved in support of the indictment. The statute under which the prisoners were indicted

24-25 Vic., ch. 97, sec. 3, is the same in effect, and almost in words as our Dominion Act, 32-33 Vic. ch. 22, sec. 3.

The words of our statute are, sec. 3: "Whosoever unlawfully and maliciously sets fire to any house, stable, coach-house, * * whether the same is then in the possession of the offender, or in the possession of any other person, with the intent thereby to injure or defraud any person, is guilty of felony."

In the case above, cited from L. R. 1. C. C. R. it was contended that the prosecutor had failed to shew that such an insurance existed in Holdsworth's name, and therefore the intent to defraud was not made out, and that it would not be contended that there was an intent to *injure* himself by setting fire to the shop "of, and belonging to himself." The Judge asked the jury if they believed the prisoners intended to injure the landlady, and also if they believed they had an intent to defraud the insurance office? The jury answered, they found both intents. The Court held that, under the statute, the averment of ownership was immaterial, and there was nothing to prevent the jury finding an intent to injure the landlady, the real owner.

Here then what is the ground now set up against this amendment on behalf of the prisoner, that the charge should have been with an intent to injure, and not an intent to defraud. Supposing it be admitted that he did feloniously and maliciously set fire to the house in question, what "merits" can it be suggested he has in defeating the law because he did the act to *injure* some person instead of *defrauding* a person, and how can such a defence be anything but a technical or formal one, and not on the merits?

Besides, the 32-33 Vic. ch. 29, sec. 27, declares that the forms of indictment in Schedule A to the Act "may be used, and shall be sufficient as respects the several offences to which they respectively relate." It goes on to provide that the forms as to offences not mentioned in the schedule might serve as a guide as to how offences were to be charged to avoid surplusage. In Schedule A, under

the head of malicious injuries to property, a form of indictment is given, the same as the count on which the prisoner was tried, except that the words "with intent to defraud," in this count, are not in the form given to the schedule to the Act.

I see no reason why the learned chairman of the Quarter Sessions might not have amended this count by striking out "*defraud*," and inserting "*injure*," or why he could not properly do what he has done, strike out all the words about "the intent," which, by the form given in our statute, are not necessary, and which form is declared to be sufficient.

I apprehend, however, notwithstanding the omission of the *intent* in the indictment, that it would be necessary to shew on the trial that there was an intent to injure or defraud.

The natural result of the destruction of the property was to injure somebody, and the general rule, that a party intends the natural consequence of his act, must apply in arson as well as in other cases.

The case referred to by Mr. MacKenzie on the argument is an express authority on this point. There, the necessary consequence of setting fire to a mill being to injure the owners, the intent to injure might be inferred. The evidence in that case, *Rex v. Farrington*, 1 R. & R. p. 207, shews that the prisoner was a harmless, inoffensive man: that there never had been any quarrel or disagreement between him and the owner of the mill, or any of the clerks; and they were not aware of any motive which could induce him to do the act. The jury found the prisoner guilty on an indictment charging him with intent to injure and defraud the owners. The judges held the conviction right.

The mere fact that the prisoner was the brother-in-law of the owner of the house, would not repel the presumption that intending to injure was the natural result of the act. If, in order to repel that presumption, it was shewn that the property was insured, and therefore it could not

be intended to injure his brother-in-law, then the intention to defraud the insurance company would be apparent; and in that view the conviction would be right.

The fact that the mortgagees were injured by the destruction of the house was shewn, and in that view the conviction could be sustained; and if the presumption as to intent to injure them could only be repelled by shewing that the property was insured, and their claims covered by the insurance, then the intent to defraud would still be shewn. But as I understand this case, there was not proper evidence given of the property being insured; and therefore on the facts shewn the conviction seems right.

The words in section 3 of 22-33 Vic. ch. 22, in referring to the house, "whether the same is then in the possession of the offender or in the *possession* of any other person," can hardly mean that if the building is "unoccupied" therefore it is not an offence within that section. If no one else is in occupation or possession of the building, the owner is in law in "possession."

The points pressed on us in argument were, that the amendment ought not to have been made, as under that section of the statute there must have been an intent to injure or defraud, and it was necessary to allege such intent in the indictment; and that if necessary to allege it in the indictment, then amending the indictment by striking it out or substituting the intent to injure for the intent to defraud, alters the offence, and the Court ought not to have made the amendment.

The form of indictment given in our own statute is declared to be sufficient, and that does not charge the intent; and the evidence seems to be sufficient, from which the jury may infer the intent.

If our own statutory form of indictment was not sufficient, I think the amendment as to the intent was one which the Court might well make and ought to have made. In the view in which the case is presented to us, we think that the judgment of the Court of General Sessions should be affirmed.

Judgment affirmed.

LEE V. GRAND TRUNK RAILWAY CO.

R. W. Co.—Merchandise carried as personal luggage—Liability.

The plaintiff, an emigrant for Toronto, brought with him from England a box, as personal luggage, which contained only rare plants and roses intended for sale. He delivered it to the defendants' baggage master at Quebec, saying that he would pay for it, but not stating its contents, on which the latter asked for his ticket, and on seeing that it was a third-class Government emigrant ticket, he said there was nothing to pay, and that it might go with the plaintiff in the train. The plaintiff said the box was marked somewhere "Plants—perishable," but he could not say defendants' officers saw it, and it was sworn that if they had been notified that it was freight or merchandise it would not have been taken. *Held*, that defendants were not liable for its loss.

DECLARATION.—First count: that the plaintiff delivered certain goods to defendants, as common carriers, which they received to be safely and securely carried from Quebec to Toronto, and there delivered to the plaintiff for reward &c.: that defendants did not there deliver, &c., and the goods became lost to the plaintiff through the negligence of defendants.

Second count, like the first, omitting the allegation as to reward therefor.

Third count: that in consideration that the plaintiff would entrust to defendants certain goods, and would pay defendants a sum of money, defendants promised the plaintiff they would securely and safely carry the goods from Quebec to Toronto, &c.: breach, that defendants did not do so, and the goods became lost to the plaintiff.

Fourth count, as the third, omitting the allegation as to reward. This count was given up at the trial.

Pleas: 1. To first and second counts, not guilty.

2. To same counts, that the plaintiff did not deliver, nor did the defendants accept the said goods on the terms as alleged.

3. That the defendants did safely carry the goods, and deliver the same to the plaintiff.

4. To third and fourth counts, that defendants did not promise.

5. To the same, that the plaintiff did not deliver the goods, &c., to the defendants.

6. To the same, that defendants safely carried the goods, &c.

7. That the plaintiff never delivered the goods to defendants as alleged, &c.

8. That the goods were trees, rose-bushes, roots, plants, &c., in a box or trunk : that at the time of the delivery of the goods the defendants were carriers of passengers and goods for hire, and as such on their passenger trains they carried passengers with their ordinary personal luggage free of charge for said luggage : that the plaintiff was a passenger from Quebec to Toronto, with a quantity of personal luggage : that the plaintiff, as such passenger, delivered to the defendants said goods in said box or trunk as part of his personal luggage, to be carried as such luggage, and did not give notice to the defendants that said luggage, or the said trunk or box, contained any such articles as above mentioned, and that the defendants had no knowledge or notice that the said goods were in or formed part of the said stuff or luggage offered by the plaintiff, and delivered to them, and by them received as his personal luggage : that the said goods, &c., were not ordinary personal luggage, but freight or extra luggage, and should have been paid for as such ; and that, had the defendants had notice, they would not have received the same as such personal luggage : that the said goods, while on said passenger train, or at defendants' station at Toronto, were lost or stolen.

Issue was taken on all the pleas.

The cause was tried before Wilson, J., and a jury, at the Winter Assizes, 1874, at Toronto.

The material facts appearing at the trial were, that the plaintiff arrived at Quebec as an emigrant, destined for Toronto, *via* the defendants' railway : that he had with him a box, of a kind not unusual for an emigrant to have : that he brought it from York to Liverpool, in England, as personal luggage, taking it on board the Sarmatian, and landing with it as such at Quebec, where it was put on the defendants' emigrant train with the plaintiff as an

emigrant passenger. The box in question contained no personal luggage, only rare plants and roses, valued at \$300, which the plaintiff was bringing for sale in this country, things which could not in any light have been considered personal luggage. The box was delivered by the plaintiff to the defendants' baggage-master, and received by him as personal luggage, without any notice or knowledge of its contents, the plaintiff's testimony shewing that he avoided informing or notifying the officer what it contained, but leaving him to infer that it was the personal luggage of an emigrant.

The plaintiff stated that he said to the baggage-master that he would pay for it, who replied, "Shew me your ticket," and seeing that it was a third-class government emigrant ticket, said there was nothing to pay, and that it would go with the plaintiff in the emigrant train. It was also stated by the plaintiff that the box was marked somewhere, "Plants, perishable," but he could not say defendants' officers saw it. The defendants' officer at Quebec said he saw no box marked plants, and that if he had been notified of such a box he would not have received it or sent it forward as personal luggage.

The box was marked with a red label for Toronto, and put on the train the plaintiff travelled by to Toronto, and when the plaintiff arrived at the Union Station, Toronto, at night he asked for his box, but was told it was too late then to open the car, and that he would get it at the emigrant shed next morning. Next morning the box could not be found, and the plaintiff never received it.

Several objections were taken as to the liability of the defendants, and the right of the plaintiff to recover, both at the close of the plaintiff's evidence and at the close of the case.

The learned Judge allowed the case to go to the jury, reserving leave to the defendants to move to enter a non-suit, leaving several questions to the jury, which they answered; but as they finally disagreed, and were discharged, it is not necessary to refer to the answers.

During Hilary term, February 2, 1874, *McMichael*, Q.C., obtained a rule to enter a nonsuit under 34 Vic. ch. 12, sec. 10, O.

During this term, February 3, 1875, *Osler* shewed cause. It is admitted that the plants were not personal luggage; but having been received by the defendants and carried without objection on their behalf, the defendants are liable. It is probable that the Company's officers would know the nature of the contents of the box, as it was labelled "plants" in a way to catch the eye. The shape and size of the box also was an indication or notice to the defendants that it did not contain personal luggage. He referred to *Great Northern R. W. Co. v. Shepherd*, 8 Ex. 30; *Cahill v. London, &c., North-Western R. W. Co.*, 13 C. B. N. S. 818, in the Exchequer Chamber, affirming the judgment of the Common Pleas in 10 C. B. N. S. 154; *Macrow v. Great Western R. W. Co.*, L. R. 6 Q. B. 612; *Bruty v. Grand Trunk R. W. Co.*, 32 U. C. R. 66.

McMichael, Q. C., contra. It should be shewn that the nature of the contents of the box was brought to our knowledge; and if this is not done, assuming the law otherwise to be as has been argued for the plaintiff, the plaintiff must fail. He cited *Bruty v. Grand Trunk R. W. Co.*, 32 U. C. R. 66; *Belfast and Ballymena R. W. Co. et al. v. Keys*, 9 H. L. 556.

March 2, 1875, MORRISON, J., delivered the judgment of the Court.

As to the offer to pay, it is clear what the plaintiff meant was, that he expected the officer would weigh the box, and that he would have to pay for the over-weight, just as he had done in England, from York to Liverpool, for the weight over the limit prescribed for personal luggage.

There is no pretence that he meant to pay for it as freight or merchandize. If he had so notified the defendants' officer, his duty in such a case was not to receive it to be sent by the emigrant train, and he swears he could not have so received it. The testimony of the plaintiff and

defendants' baggage-master, from all the circumstances attending the landing from the ship, to the reception of the box at the emigrant shed, lead to only one conclusion—that the box was delivered, received and placed on the train as personal luggage, nothing being said or done to warn the defendants that it was otherwise, or of the nature of the contents of the box ; and nothing was paid for its carriage.

Assuming the correctness of the plaintiff's memory as to a card marked "plants perishable" being somewhere on the box, yet he could not say where it was, or whether it was in sight, or could be seen at the time of its delivery, and being labelled as luggage for Toronto.

We see no evidence that the officer of the company who received the box, being notified of its contents, to carry it, notwithstanding, as personal luggage.

It would be unreasonable to hold that, because a person said to a railway officer that he wished to pay for what appeared to be ordinary luggage, which would go free, and the other replying, upon seeing that he had a ticket as a passenger, there was nothing to pay, that without any notice to the railway that it contained merchandize, and not personal luggage, the company would be liable if lost or injured.

The case of *Cahill v. The London & North Western R. W. Co.*, 13 C.B.N. S. 818, in Ex. Ch., affirming the judgment of the Common Pleas, 10 C. B. N. S. 154, is somewhat like this, and an authority in favour of the defendants. There the passenger brought with him as luggage a box containing only merchandize, not exceeding the weight for personal luggage, and on the box was printed, in large letters, the word "glass." No information was given by the plaintiff to the company's servants, nor was any inquiry made by them as to the contents of the box. In an action for the loss of the box and its contents, the Common Pleas held, as the box contained merchandize only, and not personal luggage, there was no contract on the part of the company to carry it, and they were not liable for the loss.

It was urged that, as the company chose to receive the package as ordinary luggage, and there was no misrepresentation by the plaintiff, they were responsible. The Exchequer Chamber, without hearing the other side, affirmed the judgment of the Pleas.

Cockburn, C. J., giving judgment, said, in 13 C. B. N. S. 819: "If a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandize, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk. The question, therefore, comes to this, was there knowledge on the part of the company that the box which the plaintiff was carrying with him as personal luggage in fact contained merchandize? That which was said by Parke, B., in *The Great Northern Railway v. Shepherd*, 8 Ex. 30, is in perfect conformity with the view which we now take of the question. Can we, from the facts stated in the special case, come to the conclusion that there was knowledge on the part of the company, by their servants, that this box contained merchandize? I must confess I do not see my way to that conclusion. It is true that the package bore the semblance of a package of merchandize: and it was marked 'Glass.' But many packages which do not contain merchandize are so marked in order to secure their being handled with more than ordinary caution. It is not found in the case that the company or their servants had any knowledge on the subject: nor do I think we can assume it as a legitimate conclusion from the facts as stated."

On the whole, we are of opinion that the defendants' rule to enter a nonsuit should be made absolute.

Rule absolute.

KEYS v. GUY.

*House encroaching on plaintiff's land—Ejectment—License to occupy—
Tenancy at will.*

The plaintiff owned lot 11 on Seaton Street, in the City of Toronto, and defendant lot 10 adjoining. There was a house situate partly on each lot, and it appeared that the plaintiff and one A., under whom defendant claimed, had mutually agreed that A. should occupy a part of the house which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to defendant.

Held, that defendant must be regarded either as tenant at will to or as occupying under a license from the plaintiff, and could not be ejected without notice or a revocation of the license; and that in either case he would be entitled to a reasonable time to remove what he might have in the house.

EJECTMENT for a small portion of town lot No. 11, on Seaton street, in the city of Toronto.

The plaintiff claimed title under a deed from Mrs. Ridout.

And the defendant set up an equitable defence, to the effect that at the time of the survey of lots 10 and 11 there was erected a house, situate partly on these two lots, and that it was agreed by the plaintiff and a Mrs. Armstrong, under whom the defendant claimed, at the time they purchased respectively the said lots 10 and 11, that the house should be occupied by the plaintiff and Mrs. Armstrong, as near as the interior partitions and walls of the house would admit of, without inconveniencing either of them, or putting them to the expense of altering or changing the partitions, notwithstanding that the division line between the lots as the house stood did not run on a line with such partitions, but that the occupation by such partitions gave to Mrs. Armstrong a portion of the house belonging to the plaintiff standing on lot 11; and that they mutually agreed that they should both occupy the house according to such partitions so long as the house stood; and that they both accepted the conveyances from Mrs. Ridout of their respective lots on that understanding, and although such occupation was not exactly according to the dividing limit of lots 10 and 11: that Mrs. Armstrong

occupied the portion of the house accordingly until her death, and her heirs afterwards until they conveyed lot 10 to the defendant, who continued the like occupation; and he claimed that he ought not to be ejected for so much of lot no 11.

The cause was tried before Burton, J., at the Toronto Fall Assizes.

At the trial the plaintiff proved title to lot No. 11, and the defendant to lot No. 10; and it appeared that a portion of the house, as occupied by the defendant, stood on Lot 11 to the extent of $2\frac{1}{4}$ inches at one end, and 2 feet 4 inches at the other end, along a depth of about 20 feet. It also appeared that Mrs. Armstrong, under whom the defendant claimed, occupied the premises from the time when she purchased, as at present occupied by the defendant, until her death; and that her heirs so occupying it, in 1863, conveyed to defendant lot No. 10, and he continued the same occupation, the house remaining as it stood at the time of the purchase of the lots by the plaintiff and Mrs. Armstrong from Mrs. Ridout, the previous owner.

It was clear, from the evidence, that the plaintiff and Mrs. Armstrong mutually agreed that Mrs. Armstrong might occupy, with her share or part of the house standing on lot 10, that small portion of the house standing on lot No. 11 bounded by a partition and occupying or covering the piece in dispute; and that she so occupied it until her decease, and her heirs until they conveyed to the defendant, who since then occupied it in like manner.

It is not necessary to go into the merits of the equitable defence, as the learned Judge held that it was not sufficiently proved, and that the defendant was not entitled in that respect to succeed, and, being of opinion that there was no mistake in the deeds, which correctly described the lands intended to be conveyed to each, that the plaintiff was entitled to a verdict. It was, however, contended that the defendant was entitled to some notice or demand of possession before action, none being proved at the trial.

A verdict was entered for the plaintiff.

In last Michaelmas term, *J. K. Kerr* obtained a rule *nisi* to set aside the verdict, and enter a verdict for the defendant, pursuant to the Law Reform Act, the verdict being contrary to law and evidence.

In this term, February 12, *McMichael*, Q. C., shewed cause, and cited *Lewis v. Robson*, 18 Grant 395.

J. K. Kerr supported his rule, and relied on *Coles v. Pilkington*, 23 W. R. 41; *Anundomohey Dossee v. East India Co.*, 8 W. R. 245; *Woodfall L. & T.*, 6th ed., 183.

March 6, 1875. MORRISON, J., delivered the judgment of the Court.

It seems to us that this defendant is in possession of the small piece of land in question, either as a tenant at will, or occupied it under a license from the plaintiff. In either case he would be entitled to a demand of possession or notice to quit.

From the evidence there can be no doubt that Mrs. Armstrong, under whose heirs the defendant went into possession, occupied the portion of this house covering the land in question, owing to the peculiar position of the partitions, with the permission of the plaintiff, and no doubt, as suggested, because it was convenient for both parties; and that she so occupied until her decease; and that her heirs and the defendant continued that occupation until this action.

The general principle laid down in the various authorities is, that where a person is suffered by the owner to occupy a house or premises, or live in a house free without limitation to time, such person in the eye of the law is a tenant at will: that while such a tenancy may be created by express agreement, it also may arise by implication where premises are in the occupation of a person holding them with the permission and consent of the owner.

In the case of *Rex v. Collet et al*, Russ. & Ry. 498, where the prisoners were convicted of breaking into a house, laid as the house of Ann Pemberton, a question arose whether it could be called her house. The house belonged to Lord

Spencer; one Cook had rented it; he failed and left the place; and nobody but Ann Pemberton, who had been his servant, resided in the house. The house was given up to Lord Spencer, but Ann Pemberton was permitted to remain in it, paying no rent. The question in the trial was whether she was a tenant at will. The case was reserved for the opinion of the Judges, and they held that the house was rightly laid in the indictment as hers, as she was there as a tenant at will.

Now, here, since the death of Mrs. Armstrong, her heirs, and the defendant through them, have been in the like and continued occupation of the premises; or rather, we should say, the plaintiff permitted these parties to continue the same occupation which this defendant has done since 1863.

Under these circumstances, we think the Court, assuming the functions of a jury, may reasonably assume that the defendant was occupying the premises with the permission, consent, and concurrence of the plaintiff, and upon the same terms Mrs. Armstrong did, and as a continuation of her holding; or that the defendant so occupied the premises under a parol license from the plaintiff. In either case the defendant would be entitled to succeed for the want of a notice determining the tenancy at will, or of a revocation of the license to occupy. Neither was given; and it seems to me that in either case the defendant would be entitled, in a case of this nature, to a reasonable time after the notice or revocation of license, to remove or take away anything that the defendant might have in that part of the house which extended into the plaintiff's land.

As said by Willes, J., in *Cornish v. Stubbs*, L. R. 5 C. P. at page 339: "The only question is, whether the tenant has a right to a reasonable time after the revocation of the license to take away his goods; and I am clear that he has. The rule of law is, that a simple license, in order to be binding on the licensor, must be under seal; but if it is not, the licensee is not a trespasser until the licensor revokes the license. Under a parol license the licensee has a right to a reasonable time to go off the land after it has been withdrawn, before he can be forcibly thrust off it."

And in a still later case, *Mellor v. Watkins*, L. R. 9 Q. B. at page 405, Cockburn, C. J., says, "Principle, reason, and common sense alike require that, although a license may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them."

And Blackburn, J., says, "I am happy to find that this position has already been established by the case of *Cornish v. Stubbs*, in which the judgment of Willes, J. goes most fully into the principle."

See also *Jones v. Mills*, 10 C. B. N. S. 796; judgment of Erle, C. J., and *Thunder d. Wearer v. Belcher*, 3 East 449.

It is very much to be regretted that these people should, for so trifling a matter, be involved in this litigation.

On the whole, we think there should be a new trial, costs reserved until after the result of the second trial.

Rule absolute.

GILES, ROBERT, (EXECUTOR OF JOHN MCARTHUR, DECEASED), v. GREAT WESTERN R. W. CO.

R. W. Co.—Accident to passenger—Evidence of negligence.

The deceased was a passenger in defendants' railway for W. station, and was, as the conductor said, "pretty drunk" when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond it, about four feet from the rail, with his legs cut through at the knee-joints and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there were only two passengers, to enable persons to alight; but the other passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The conductor and baggage-master also got off there to see the station-master and returned to the cars. There was no further proof of the manner in which deceased met with the accident.

Held. that there was no evidence of negligence on defendants' part to go to the jury, and a nonsuit was ordered: RICHARDS, C. J., doubting, (but not dissenting), on the ground that deceased having been taken on the train while intoxicated with the conductor's knowledge, and the very short stoppage at the station, afforded some evidence of negligence.

ACTION by executor for negligence, by reason of which John McArthur, the testator, was killed.

Plea : Not guilty by statute.

The cause was tried at London, at the Spring Assizes, 1874, before MORRISON, J.

The evidence shewed that the deceased had a woollen factory, which he carried on at Byron. He left his home on the morning of the 24th of July to go to London. He was at London that evening. He took the train there to go to White's Station, on the London & Port Stanley railway line. The train was about two hours and a half after time in starting that night. It left about 9 p.m.

The deceased was in the smoking car before and at the time the train got to White's Station. He asked Mr. Carter, a fellow-passenger, after having left St. Thomas, and when brakes were being put on, if it was Union Station. Carter said he did not know. The deceased went out, and Carter heard him call, "Is this Union Station?" and some one said it was White's, and immediately the train started, and it went off with a jerk, as Carter said. He also said the conductor immediately came through the car, and asked if that man had got off, and Carter said he had. Carter also said he thought the deceased would have got off the same as any other person.

The plaintiff's witnesses spoke of the time of stoppage at White's Station being not more than half a minute or a minute, and as scarcely affording time for a person to get off the train.

Whaley, a passenger on the train, said it stopped not long enough to enable a person to get off, and it started again with a jerk.

Francis Jones, a witness called in reply for the plaintiff, said he did not think a person could, after the train stopped, pass any distance from the train and get on to it again before it started. He said as soon as the train stopped there he was prepared to leave it; he had no trouble in getting off; he walked off leisurely; he might have gone five or six steps from the train before it started.

For the defence : The conductor, the baggage master, the engine driver, the station master, and the brakesman, all

stated the train stopped at the station : that the brakesman called out the name of the station : that the conductor and baggage master went on to the platform, the conductor speaking to the station master, and the baggage master giving letters to the station master.

The conductor said he asked Carter if the deceased was out, who said, Yes, some time, and he (the conductor) gave the signal to go on.

There was some evidence, also, as to the deceased being under the influence of liquor.

Wm. Carter, a witness for the plaintiff, said we (deceased and witness) drank in the car from a flask, and when we got out at St. Thomas we had beer. I noticed no cut in his face ; did not look at his face ; I did not think he was drunk ; others might think he was ; he was telling me all about his affairs, although I was a stranger.

Wm. Whaley thought deceased was sober when at London Station.

The conductor said the deceased was pretty drunk at London ; he did know he had anything to drink after that.

Melville Dawson and *Edwin Syer* both said they saw the deceased at London, and he was then the worse of liquor.

All that was known of the accident was that the deceased left the car at White's Station to go off.

The next morning, the 25th of July, *John Dufton* saw the deceased about six o'clock, 100 yards south of White's Station, about four feet from the rail, on the west side. He was cut through the knee joint, and it appeared recently done—there was blood on the track and to where he lay—and that he rolled over to get away from the cars. With the assistance of the station master he was taken to the cars, and then to London, and died that afternoon.

Giles, the plaintiff, and son-in-law of the deceased, said he saw deceased between 9 and 10 o'clock in the morning of the 25th ; he was "brought to my house on a door * * ; he stated how the accident occurred, and that he was pitched from the cars."

The evidence shewed the deceased to have been about 45 years of age ; his widow about 42. He had four children at home. Margaret (a widow), the eldest, about 20 or 21 ; Alexander, 17 ; Jessie, 15 ; and David, about 5 or 6. The three eldest children worked in the woollen factory of the deceased.

The business of the deceased was worth from \$1,000 to \$1,500 a year. The first year he made money. No wages were entered as paid to his children. He was in arrear at his death to the amount of about \$1,000.

The two eldest children were in a factory at Woodstock. The widow was going into market gardening ; Alexander was working with her.

The counsel for the defendants took several objections to the charge of the learned Judge, which appear in the rule below.

The jury gave a verdict for the plaintiff, and damages, as follows :—

To the widow.....	\$1,000
“ Margaret	200
“ Alexander	300
“ Jessie.....	500
“ David	1,000

There was leave reserved to move to enter a nonsuit.

In Easter Term, June 20th, 1874, *Barker* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a nonsuit entered, on the grounds :—

1. There was no evidence of negligence by the defendants proved, nor any evidence given as to what caused the death of John McArthur ; and

2. There was contributory negligence on the part of the deceased.

Or to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds :

1. That as to the children, Margaret, Alexander, and Jessie, there was no evidence of any pecuniary damage or injury sustained by them or any of them.

2. The verdict was contrary to evidence and the weight of evidence.

3. There was contributory negligence on the part of the deceased.

4. There was misdirection by the learned Judge, in telling the jury that if the defendants received the deceased as a passenger while under the influence of liquor, they were bound to take more than the usual care that he did not sustain injury.

5. That as there was no evidence of the cause of the accident, or the time it happened, it was only to be inferred, and it was for the jury to draw the inference.

6. There was a want of direction in not telling the jury that as the cause of the death was not proved, they should find for the defendants, and that if the drunkenness of the deceased contributed to the accident, the plaintiff could not succeed in the action.

In Michaelmas Term, November 27, 1874, *Harrison*, Q.C., shewed cause. There was evidence the train did not stop long enough at White's Station to enable the deceased to leave it. The fact that he was found the next morning about 100 yards past or south of the station is quite consistent with the fact that he may have been dragged from the station while he was trying to alight. The cause and the manner of the injury were for the jury to determine: *Williams v. Great W. R. Co.*, L. R. 9 Ex. 157.

He cited also the following cases: *Leishman v. London, Brighton & South Coast R. W. Co.*, 23 L. T. N. S. 712; *Burke v. Manchester, Sheffield & Lincolnshire R. W. Co.*, 22 L. T. N. S. 442; *Praeger v. Bristol & Exeter R. W. Co.*, 24 L. T. N. S. 105; *Cockle v. London & South Eastern R. W. Co.*, L. R. 7 C. P. 323; *London & North Western R. W. Co. v. Hellowell*, 26 L. T. N. S. 557; *Gill v. Great Eastern R. W. Co.*, 26 L. T. N. S. 945; *Whittaker v. Manchester & Sheffield R. W. Co.*, L. R. 5 C. P. 464, note; *Toledo, Wabash & Western R. W. Co. v. Baddeley*, 5 Am. Rep. 71; *Kerr v. Forgue*, 54 Illinois 482; *New Orleans, Jackson & Great*

Northern R. W. Co. v. Statham, 42 Missouri 607; *Thompson v. Belfast, Holywood & Bangor R. W. Co.*, L. R. 5 Ir. C. L. 517; *Nicholls v. Great Southern & Western R. W. Co.*, L. R. 7 Ir. C. L. 40; *Hogan v. South Eastern R. W. Co.*, 28 L. T. N. S. 271; *Memphis & Charleston R. W. Co. v. Whitfield*, 7 Am. Rep. 699. If a railway company receive a passenger who is sick, additional care of such person must be taken by the company if he requires additional care. There was no evidence of contributory negligence; it was left to the jury, who alone could settle it: *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Cornish v. Toronto Street Railway Co.*, 23 C. P. 355; *Washington & Georgetown R. W. Co. v. Gladmon*, 15 Wallace 401. The damages are not complained of.

J. H. Cameron, Q.C., supported the rule. There is no account whatever of the manner in which the accident happened. The statement of the deceased that he was jerked off the car was objected to, and it was not proceeded with further. The rule as to negligence, as laid down by Willes, J. in *Daniel v. Metropolitan R. W. Co.*, L. R. 3 C. P. 216 S. C. in Ex. Ch. 591 was acted on by the House of Lords, when the same case was carried there on appeal: L. R. 5 H. L. 45; and it was also adopted in *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157. This last case the defendants rely upon as a decision in their favour, because, while the railway company was guilty of negligence in that case, the defendants are free from it here by the ruling in that case: *Weller v. London, Brighton, & South Coast R. W. Co.*, 29 L. T. N. S. 888; *Lewis v. The London, Chatham, & Dover R. W. Co.*, L. R. 9 Q. B. 66. Calling out the name of the station is not an invitation for the passengers to alight: *Singleton v. Southern Counties R. W. Co.*, 3 C. B. N. S.

March 6, 1875, WILSON, J., delivered the judgment of the Court.

It is very certain from the nature of the injury done to the deceased that he could not have walked from White's

Station to the place where he was found, 100 yards past it to the south. He was found in the morning there, and he must have lain there through the night. How he got there, or how the accident happened, was in no way explained. It must be altogether a conjecture. It can scarcely be an inference, for we do not know enough from which to infer anything with much probability.

We know the deceased left the place where he sat in the car and went out of the door, enquiring if the station they were at was Union Station, and some one answered him it was White's Station.

He was to get out at White's Station. From that time no one saw him until he was found on the road the following morning.

Whether he tried to get off the car at the station and slipped, and the train started while he retained his hold, dragging him along to the place where he was found; or whether the train started before he alighted, and he stepped off still keeping his hold; or whether he fell from the platform, or was jerked off it, and so fell between the cars, we are entirely ignorant.

From the nature of the injury—"the right leg hanging by some sinews, and the left foot crushed to a mummy," and "cut through the knee joints," so that both legs had to be amputated, from which injury the deceased died the same day—it may perhaps be inferred that the deceased was not dragged (if dragged at all) after these injuries; but that he was injured on that part of the track opposite to which he was found lying.

If one may reason a little further on the case, I should think if the deceased tried to get off and stepped from the car that the injury happened almost immediately after or at the time he so stepped off the car. He would not step off in all probability without keeping his hold of the hand rail. If he had done so, however else he might have been injured, he would not have been likely to have had his legs parallel to the rail so as to have his knee and foot both crushed by the wheel. If he retained his hold of the hand

rail, it is probable the moment he touched the ground with his feet the onward motion of the train jerked his head and shoulders forward, and jerked him off his feet at the same time, thus bringing his body parallel to the track.

That would not necessarily incline the body towards the track, but it might do so, and it might do so more or less according to which foot first reached the ground, and by which hand he held the rail. If he held the south rail by the left hand (getting off on the west side) he would be jerked with his left shoulder foremost and his face inclined to the engine, which was going south. If he held the north rail by the right hand, he would be jerked backward, that is, with his back to the engine, and his feet might be thrown up and twisted toward the track.

In some way or other, if he got off at the side, he must have been drawn or twisted in upon the rail, and in all probability lengthwise or parallel to the rail, from the manner he was injured. So far, then, as a mere conjecture, the deceased may have attempted to leave the car after it had passed the station and while it was in motion. In doing so he stepped on the ground just about the very spot where he was afterwards found. He retained his hold of the hand rail while he stepped on the ground, and while he had hold of it the motion of the car pulled the upper part of the body forward so that his head was towards the engine and his body parallel to the track; and the legs, while the body was in that position, were drawn or inclined to or twisted in upon the rail, and the injury followed. There are difficulties in the way, on this evidence, of imagining the deceased got off while the train was at rest; or that he got off at the station at all; or that he was dragged the distance of a hundred yards before he was hurt; or in believing he could have been dragged such a distance, or any distance, after receiving such severe injuries.

There is another view of the case to be considered, and, as before, by way of conjecture. The deceased certainly went upon and was upon the platform in order to leave the

car. He would not be allowed by the ordinary rules of the company to have remained on the platform, but he would be at liberty, when he had gone to the platform to alight, to remain upon it a reasonable time to see if there were any chance of his being able to leave it with safety.

And if he were upon the platform for that purpose, and while so there, and before he should have returned to his seat in the car, he was thrown from or jerked off it by any act of negligence of the defendants in the running of their cars, and so received his injuries, there would be a remedy against the defendants.

We do not know he was thrown or jerked off by any negligence of the defendants.

What evidence, then, was there of any negligence on the part of the defendants? The train did stop at White's Station. Mr. Jones, one of the plaintiff's witnesses, who was a passenger on the train, says he got off leisurely, and had gone five or six paces from the track, before the train started. The station master and the conductor also saw Jones alight. The conductor and the baggage master on the train both alighted from the train and went to the station master, who was on the platform, and returned to the cars.

All the witnesses agree that the train did stop at the station.

The time it did stop is said by the plaintiff's witnesses to have been about half a minute, and two of them, Murray and Whaley, say not long enough or scarcely long enough to enable a person to get off. Carter said that when the deceased was told (as I understand, outside of the car) that it was White's Station they were at, the train immediately started and with a jerk, and the deceased had not time to get off. In his cross-examination he said: "I thought he (the deceased) would have got off;" and he also said when the conductor, after the train started, asked him if the deceased got off, that he had. The conductor said that after getting that answer from Carter he gave the signal to go on.

The stay at the station does not seem, from any of the evidence, to have been more than for a very short time, whatever the exact duration of that time may have been.

It was long enough for Mr. Jones to leave the train leisurely, and to take a few steps after alighting before the train moved off; and Mr. Carter thought the deceased had left the train, and he so informed the conductor.

If the time, then, be a disputable fact, and it certainly is so, and if the injury happened to the deceased at that place, there was evidence to go to the jury as to whether the stoppage at the station was or was not for such a reasonable time as to have permitted the deceased to alight.

So far as the evidence shews, there were only the two passengers for that station, and the train need not have waited very long, and it must have been known would not wait very long for so small a number. Still, a reasonable time must be allowed to everyone to alight, and that was a question for the jury.

But the time of stoppage at the station was only material if the injury happened there.

The case of *Lewis v. The London, Chatham, and Dover R. W. Co.*, L. R. 9 Q. B. 66, is important on this point. If the deceased were under the influence of liquor, Mr. Carter, his fellow-passenger, did not think it disabled him from acting for himself. No one seems to have thought, however in fact he may have been, that he was not in a fit state to take care of himself.

If he were more under the influence of drinking than any one supposed him to have been, that may have accounted for his delay in getting off as Mr. Jones did; and if he had a reasonable time afforded him at the station to get off, and he did not alight, his delay may very likely have been caused by the state he was in; and the defendants would not be liable for his injury if he were injured there, unless the conductor knew the deceased was intoxicated and unable to take care of himself, in which case the conductor would certainly, having taken him as a passenger, be bound to give him that degree of attention as to his safety

while under his care which a man in the state of the deceased is fairly entitled to beyond that of an ordinary passenger.

I do not think the conductor thought him to be so intoxicated as to require any care at all; and certainly Mr. Carter, with whom the deceased had been in intimate conversation on the journey, did not think him to be in such a state. If that be so, then the deceased did not require more care than anyone else.

Was he then injured at the station? For the reasons already given I think he was not, and could not possibly have been.

And if he were injured at a hundred yards past the station, it must have been by his own voluntary act in getting off or in attempting to get off the car while it was in motion, or by his being thrown off the platform before he could reasonably have left it, and resumed his seat.

If this case require further consideration to determine by inference, if a sufficient foundation be laid for it, when and where the injury happened, I shall have no objection to such further investigation.

As the case stands at present, I feel it to be one resting upon conjecture only, and that conjecture appears to me to be more against than for the plaintiff.

If the deceased were excited by drink—although not drunk, and although able to take care of himself, generally speaking—he may have been more careless or venturous than a man perfectly sober might have been, and he might very likely, although the car was in motion, finding he had passed the station, and without estimating the danger of his act, have made the attempt to get off, and so have brought the damage upon himself.

I do not understand the force of the statement that the deceased said he was pitched off the car, even although it were received in evidence—if that mean that he was pitched off at the station, where two of the witnesses say the train started with a jerk; for if he was pitched off or jerked off there, how did he get a hundred yards past the

station? There is force, however, in the statement of being jerked off, if the deceased were jerked off about where he was found; but if there were such a jerking off at that spot, we know nothing whatever about it

The case of *Brydges v. Directors, &c., of The North Eastern R. W. Co.*, L. R. 7 H. L. 213, in appeal from L. R. 6 Q. B. 377, is the nearest to this case I have seen. *Williams v. The Great Western R. W. Co.*, L. R. 9 Ex. 157, has also some bearing.

The case of *Hogan v. South Eastern R. W. Co.*, 28 L. T. N. S. 271, with the other cases just mentioned, shew that the facts should here be more clearly determined by a jury, and that we should not dispose of the case by a non-suit if fuller facts can be got; but I have no idea whatever that any further evidence can be given, and on that evidence there cannot be a recovery against the company.

If the deceased attempted to get off after the train had left the station, and while it was in motion, when it was dangerous to do so, there can be no recovery against the defendants: *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Cockle v. London and South Eastern R. W. Co.*, L. R. 5 C. P. 457.

The case is one of so uncertain and unsatisfactory a nature, that I do not see in what way the defendants can be charged with negligence in causing the death of the unfortunate deceased.

In my opinion the rule must be absolute to enter a non-suit.

MORRISON, J., concurred.

RICHARDS, C. J., without dissenting, was inclined to think, on the authority of *Williams v. The Great Western R. W. Co.*, L. R. 9 Ex. 157, that the facts that the deceased was taken on the train while intoxicated, with the knowledge of the conductor, and the very short stoppage at the station, afforded some evidence to go to the jury of negligence in the defendants.

Rule absolute.

GUTHRIE ET AL. V. O'CONNOR.

Guarantee—Construction—Consideration.

There were three executions in the Sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows: "I agree with G. W. & C. (the plaintiffs) to pay off the principal, interest, and costs, with Sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the Sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with defendant to go out to the place and postpone it, for which the defendant was to pay the expense. When the bailiff got there the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of \$45, which was paid to defendant. The plaintiffs thereupon sued the defendant on his guarantee: *Held*, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the plaintiffs were the proper parties to sue.

DECLARATION. First count: that the defendant, by deed dated 25th January, 1873, covenanted in the words and figures following:

"GUELPH, January 25, 1873.

I agree with Guthrie, Watt & Cutten to pay off the principal, interest, and costs, with sheriff's fees, in suits, Ontario Bank v. Wilkinson and McCorkendale v. Wilkinson in one month, in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week.

EDWARD O'CONNOR, "L. S."

That the persons named Guthrie, Watt & Cutten, in the deed, are the plaintiffs, and that the name, Edward O'Connor, subscribed to the deed, is that of defendant: that although the plaintiff did agree to postpone the said sale for a week, and although the time for such purpose has long since elapsed, the defendant did not pay off the principal, costs, &c., in said two suits, to wit, \$470, but a part thereof, to wit, \$430, is still unpaid.

Second count: that defendant covenanted to pay off the principal and costs, &c., in two certain suits, to wit, the

Ontario Bank against Wilkinson, and one McCorkendale against Wilkinson, in one month from the date thereof, and although the time has long since elapsed, and all conditions have been fulfilled, and all things happened, to entitle the plaintiff to have the same paid off by the defendant, yet the same remains unpaid to the amount of \$430 and upwards.

Pleas: 1. As to the two counts, *Non est factum*.

2. That it is not true that all conditions have been fulfilled, and all things happened to entitle the plaintiff to have paid off the principal, interest, costs, &c., in the suits in said agreement mentioned, in this, that the plaintiffs did not postpone the sale advertised of said Wilkinson's goods for one week.

3. That the agreements in the declaration mentioned were procured through the fraud, covin, and misrepresentation of the plaintiffs; and within a reasonable time after he had notice of the said fraud, and before any benefit under the said agreement was received by the defendant or the said Wilkinson, therein mentioned, he, the defendant, repudiated the same, and gave notice of such repudiation and abandonment to the plaintiffs.

Issue.

The cause was tried at the Fall Assizes at Guelph, 1873, before Galt, J., without a jury.

The plaintiffs were the attorneys for the Ontario Bank, and one McCorkendale, in suits against one Wilkinson. The defendant was the attorney for one Hazelton, who also had an execution against Wilkinson, and there was also a chattel mortgage to Hazelton for the same debt. The defendant told the plaintiff Cutten that Wilkinson's goods had been valued at \$900, and his land at \$4,000, on which he was to negotiate a loan for Wilkinson for \$2,200, and if the goods were sold they would be sacrificed. The plaintiffs had notified the sheriff in the Ontario Bank case to return the writ, and he had advertised a sale for Saturday, the 25th January, 1873, on Wilkinson's premises, in the township of Puslinch, at noon.

Defendant applied on Friday, 24th, to have the sale postponed, but the plaintiffs' attorney refused, without security, and offered to take defendant's own guarantee, but he refused to give it.

Next morning he sent the plaintiffs a letter as follows :

" Guelph, 25th January, 1873.

Re Wilkinson.

MR. CUTTEN,—I will give you the guarantee we spoke about. Instruct the sheriff to postpone the sale for a week.

Yours, &c., EDWD. O'CONNOR."

Shortly after the receipt of the letter, he came to the plaintiffs' office and signed the instrument set out in the declaration. This was about 11 o'clock, a. m. Mr. Cutten and the defendant went to the sheriff's office together, and Mr. Cutten instructed the person in charge of the sheriff's office, to postpone the sale for his execution creditors; and he added that defendant wished him to postpone for Hazelton.

The bailiff left the office with defendant for the purpose of going to Puslinch to postpone the sale. Defendant was to send the bailiff down at his own expense. It was about half-past eleven that the bailiff left the sheriff's office; he arrived at Puslinch between two and three, when the sale had been going on for more than an hour, under the direction of another bailiff named Lynch. Lynch said Hazelton's execution was first; it was about \$345. There were not goods enough to cover that execution; the principal part of the articles were sold before the sale was stopped. These goods, however, were got back, except goods to the value of \$45, $\frac{62}{100}$, which amount was paid to defendant and his partner. Defendant was put to an expense of about \$42 to get back the property, and paid \$3 possession money.

After the sale Hazelton threatened to sue, because he had a chattel mortgage on the goods.

Defendant said that his intention was, in giving the guarantee, that the bailiff should not go out, and that there should be no sale; and that at the time he gave the undertaking, he was not aware the bailiff had gone out.

Mr. Cutten said, that it was the intention to postpone the sale; he understood all he was required to do, was to instruct the sheriff; he knew Hazelton's execution was first; he said defendant did not speak of Dickey's execution; the land had been sold and the plaintiffs had not been paid the amount of the executions, which were, for the bank \$264, and McCorkendale, \$170. He said they were suing for the benefit of their clients, and the agent of the bank at Guelph said the action was brought at his request. There was some evidence about the defendant having admitted there was no fraud or misrepresentation on the part of the plaintiffs.

On the 28th January, the defendant wrote to the plaintiffs the following letter:—

“Messrs. Guthrie, Watt, & Cutten.

Guelph, *Re* Wilkinson.

Dear Sirs.—

I am not responsible on the guarantee given you herein the consideration not having been carried into effect.

Yours truly, EDWD. O'CONNOR.”

The defendant's counsel contended: 1. That the instrument given by the defendant must be treated as a guarantee, and as such could not be enforced, except as to the amount lost by the delay.

2. There was no consideration for the promise, because the plaintiffs could not stay the sale.

3. There was no fulfilment of the consideration; it was the performance, and not the agreement, which was the consideration.

4. The agreement, being executory, was never executed.

5. The agreement is void for want of mutuality.

6. The plaintiffs are not entitled to recover more than nominal damages. The second plea has been proved.

The learned Judge entered a verdict in favour of the plaintiff for 1s. damages. The case was referred under the Law Reform Act to the Court to be disposed of as the Court might decide on the above evidence.

In Michaelmas term, November 22, 1873, *C. Robinson*, Q. C., for the plaintiffs, obtained a rule *nisi* to enter the verdict for the plaintiffs for \$437, the amounts unpaid in the suits against Wilkinson, referred to in defendant's agreement under seal, or for such sum as to the Court might seem right, on the ground that the evidence shewed the plaintiffs were entitled to recover that sum, which the defendant had agreed to pay; and there was nothing in the evidence to restrict the plaintiffs to nominal damages.

In the same term, November 24, 1873, *McMichael*, Q. C., obtained a rule *nisi* for the defendant to enter a nonsuit, pursuant to leave reserved, on the ground that the instrument sued on must be taken as a guarantee, and as such cannot be enforced unless damage is shewn, and that no damage is shown: that there is no consideration for the said promise: that the agreement to consent to a postponement is not taken as a consideration, but that it must be proved that there was a fulfilment of the promise; and if not, there was no consideration for the guarantee, the consideration being executory: that the second plea was proved, and the defendant is entitled to a nonsuit.

In Easter term, May 26, 1874, *M. C. Cameron*, Q. C., shewed cause to the plaintiffs' rule and supported the defendant's rule. The agreement was, that the sale was to be postponed for a week. It was not postponed, and therefore there should have been a nonsuit, or a verdict for the defendant. The plaintiffs have sustained no damage; they were not the parties to whom the debt was due, and therefore cannot recover damages: *Moor v. Roberts*, 3 C. B. N. S. 830, 841; *Neale v. Ratcliff*, 15 Q. B. 916; *Rolt v. Cozens*, 18 C. B. 673; *Walker v. Broadhurst*, 8 Ex. 889. The action should have been brought by the execution plaintiffs: *Bateman v. Phillips*, 15 East 272. See also *Lush's Practice* "Parties to Action," vol. I., p. 7.

C. Robinson, Q. C., contra. The plaintiffs performed their part by agreeing to postpone the sale, which was what defendant bargained for. The goods were in fact advertised and sold under the execution in the cause in which

the defendant was attorney for the plaintiff, and the money arising from the sale was paid over to him and his partner: *Cooper v. Joel*, 27 Beav. 313. No one can sue on a deed except a party named in it, and therefore the plaintiffs are the proper parties to sue: *Chesterfield and Midland Silkstone Colliery Co., Limited*, v. *Hawkins*, 3 H. & C. 677, 692; *Payne v. Wilson*, 7 B. & C. 423; *Waddel v. McCabe*, 4 O. S. 191; *Robertson v. Broadfoot*, 11 U. C. R. 407, and the cases collected in *Fisher's Digest*, vol. I., p. 1742.

March 2, 1875, RICHARDS, C. J., delivered the judgment of the Court.

As far as we can gather the facts of the case, the property of Wilkinson, on whose behalf, to a certain extent at least, defendant was acting, was advertised for sale without naming the executions; and one of the executions in the sheriff's hands, and the first one in point of time, or at all events prior to those under the control of the plaintiffs, was the one in favour of defendant's client.

The defendant seems to have been in a position to control the other executions, and all he required was the consent of the plaintiffs to a postponement of theirs. At the time that consent was given no doubt they all thought the sales would be postponed, but the plaintiffs were not in a position to make an absolute postponement of the sale, so far as other execution creditors were concerned; and it was not expected by any of the parties that they would do so.

As far as we can see, the postponement would not have been made unless the defendant himself had directed or consented to it, and he did not direct it until he had obtained the plaintiffs' consent to do so, as far as the other writs were concerned.

The sale was in fact postponed for a week, and to that extent the consent was acted on, and part of the property sold was got back, and whatever was made under the execution was paid over to the defendant or his partner.

The defendant himself did not attempt to withdraw from his engagement on going to the sheriff's office, and hearing that the sale was to go on that day, which was Saturday, but he sent the bailiff to direct the sale to be adjourned. The latter did not reach the place until a considerable part of the property had been sold, as already mentioned.

The defendant only repudiated his liability on Tuesday, the 28th, and this was after the bailiff had in fact postponed the sale for a week, as appeared by the advertisement put in, and apparently after a considerable portion of the property that had been sold was returned.

It does not very plainly appear why Wilkinson, for whom defendant was acting, did not obtain the loan for the \$2200, as he expected. If defendant had been deceived as to the value of Wilkinson's personal property, and the evidence given on the trial would lead us to suppose it was not of the value of \$900, as defendant was led to suppose, that may have been a reason why the proposed arrangement for the loan was not carried out, or why defendant was not in a position to pay the plaintiff as he agreed. But that would be no reason why the plaintiffs should not recover if the substance of the agreement was that they were to consent to the postponement, and not that they were in fact to cause the sale to be postponed.

No doubt all thought it would have been postponed, and probably they thought that all that was necessary for that purpose was, that the plaintiffs should give their consent, as defendant, apparently, had control of the only other execution of which the plaintiffs then knew anything, and he, as Mr. Cutten said, was to send the bailiff down at his own expense.

Unfortunately for the defendant, for some cause, this arrangement has turned out disadvantageously for him.

This being an instrument under seal, there is no necessity for a consideration to be expressed in it; but if there was, the defendant seems to have received the consideration he bargained for. The plaintiffs' clients would not

have been allowed in the face of this agreement to have forced on the sale for the week. Whether that was a sufficient consideration for the promise considered as a mere question of what the plaintiffs' clients lost, or might lose by that postponement, is a matter of no consequence.

In the absence of fraud the smallness of the consideration in an instrument like this can be no answer to an action on it, if the party got what he bargained for; and we must say we think he did get what he bargained for, if not literally, at least in substance.

Then the doctrine is well established, that the only party who can sue on an instrument under seal is the person with whom the agreement is made. The plaintiffs were those parties. They are in fact trustees for their clients, and the covenant is not one to indemnify them from loss on account of the delay, but to pay the principal, interest, costs, and sheriff's fees, in consideration of their agreeing to postpone the sale of the goods for a week.

If the instrument is to be construed as meaning consenting to a postponement of the sale for the week, they undoubtedly did that, and the sale was in fact postponed for a week, and the larger portion of the property that had been knocked down was obtained back again.

Suppose the bailiff had just concluded the sale of a horse when the messenger with the directions for postponing the sale arrived, and informed the bailiff of it, and then the purchaser had consented to forego the purchase, and the sale had been postponed for a week, then not only would the plaintiffs have agreed to the postponing of the sale for a week, but the sale itself would have been postponed.

What was done, as far as we can understand from the evidence, was, that the property that had been sold was got back except that for the price of which the defendant himself received the amount. We infer that something was paid to induce the purchasers to give up the property that was gotten back.

We think, on the whole, that the plaintiffs substantially

gave the consideration for which the defendant gave his undertaking to pay by *agreeing* to postpone the sale for the week; they did so *agree*, and notice of the agreement was given to the sheriff, and the sheriff did in fact postpone the sale for a week, and all parties acted as to the postponement by carrying it out as far as they could do so, considering the position of things at the time the defendant signed the instrument declared on.

When he went to the sheriff's office with Mr. Cutten he did not object that the postponement could not be obtained on the consent of the plaintiffs, which was then given, nor did he then say to the plaintiffs they were bound to have the postponement made as they had agreed, and that that was their agreement. On the contrary, he appears to have undertaken to send the messenger to the officer to postpone the sale, and to have paid the expense of so doing.

The conduct of the parties gives an interpretation to the instrument, and shews, we think, that what was bargained for was that the plaintiffs should agree to the postponement of the sale.

Nothing appears on the notes of the learned Judge, from which we can infer with certainty why the defendant should have withdrawn from his undertaking to pay, save that the loan he expected to have negotiated for Wilkinson was not carried out; but why it was not we cannot tell.

On the whole, we think the verdict for the plaintiffs should be entered for \$437, and defendant's rule to enter a nonsuit should be discharged.

Plaintiffs' rule absolute.
Defendant's rule discharged.

MATTHEWS V. LLOYD ET AL.

Monthly lease—Notice to quit.

Plaintiff leased part of a house from defendant L. at \$4 a month, and if L. sold the house he was to leave if he could get another, or, according to some of the witnesses, to leave in a month. L. sold the house and conveyed it, on the 7th August, to the vendee, W., who wanted immediate possession. L. had previously given the plaintiff verbal notice to go, and on the 7th August, after he had conveyed, he at the suggestion of W. gave the plaintiff a written notice, which W. saw L. sign. The plaintiff at first promised to go, but afterwards refused, and his property was put out by L. and the other defendant on the 9th September, on which W. took possession. The jury found that the tenancy was to terminate on a month's notice, and gave the plaintiff a verdict for \$100.

Held. that the finding must be taken to mean that the plaintiff was to have a month after the sale: that if the notice was given, and the entry made, by L. by authority of W. it would be sufficient; and a new trial was granted to determine this point.

DECLARATION: Trespass *quare clausum fregit* on the plaintiff's dwelling, situate on lot 80 in the 1st concession of Whitchurch, at the corner of Mosely and George Streets, in the Village of Aurora, in the said township of Whitchurch, and stayed and made a great noise and disturbance therein, and broke the doors of the dwelling, and removed and took away the fixtures, goods, and furniture of the plaintiff therein, and broke and injured the same and disposed of the same to the defendants' own use, and expelled the plaintiff and his family from the possession of the said dwelling, and kept them so expelled from that time hitherto, whereby the plaintiff was prevented from carrying on his business and incurred expense in procuring another dwelling for himself and family.

Second count: that the defendants broke and entered certain lands of the plaintiff situate on the corner of Mosely and Yonge streets, in the village of Aurora, in the county of York, being lot 80 in the 1st concession of the township of Whitchurch, and depastured the same with cattle.

Pleas: 1. Not guilty. 2. Leave and license.

3. To first count: that the dwelling in the first count is not the dwelling house of the plaintiff as alleged.

4. To second count : that the lands in that count mentioned are not the lands of the plaintiff.

Issue.

The cause was tried before Galt, J., at the Fall Assizes of 1873, at Toronto.

The plaintiff's case was, that he had rented a part of a house from the defendant Lloyd at \$4 a month, and if Lloyd sold the house the plaintiff was to leave if he could get another house. Plaintiff took possession of the house on the 2nd of January. The part which the plaintiff took was that back of the store. Defendant sold the house on the 7th of August to James Wait. He bargained for it on the 6th of August and got the deed on the 7th. Wait wanted immediate possession.

Defendant and others interested in the matter tried in various ways to induce the plaintiff to leave, offering to give him another house rent free, and to pay the fare of his family to Owen Sound. The evidence shewed that he, at different times, promised to leave, but finally would not unless he obtained \$50.

The defendant Lloyd desired the other defendant to remove the plaintiff from the premises, and he did so on the 9th of September. Every reasonable effort was made to induce the plaintiff to leave without trouble, but in the end he declined doing so, and his property was put out without his consent, defendant Lloyd being present at the time, and having directed his co-defendant to do so.

The evidence as to the value of the property said to be lost, and as to there being any loss, was of a character to call the attention of the jury to it.

Mr. *Wait*, the person who purchased the property from Lloyd, said that Lloyd told him he could have possession of the store part "right off," and of the rest in a few days.

Lloyd said that he had already given Matthews, the plaintiff, notice, and he would go out in a few days. Mr. Wait said he had better give him a written notice. The notice was given after the deed was signed. He, Wait, saw the notice signed.

The notice was as follows:—

“To Thomas Matthews,

“Take notice that we will require you to leave the premises now occupied by you, as we have sold the same to Mr. James Wait.

(Sgd.) “WILLIAM G. LLOYD,
“Aurora, 7th August, 1873. “Executor.”

Dr. *Hellem*, who applied to the defendant Lloyd on behalf of the plaintiff to rent the place, said he understood the agreement as to giving up the premises was Mr. Lloyd said he would give him a month if the place was sold, but he was to go out at once if he could get a house. The rent was \$4 a month. Lloyd was very unwilling to let the place, as he stated he intended selling and wanted to give possession to the purchaser. The parties who interested themselves for the plaintiff induced Lloyd to let the place to him, the understanding being that he would leave in the event of a sale if he could get another place.

Dr. *Hilary* said he was to have a month if the defendant sold, and to go out at once if he could get another house.

In Mr. *Faughner's* account of it he said: “Mr. Lloyd agreed to let him have it. He agreed to leave as soon as the house was sold, if he could not get a house sooner” (*a*).

Mr. *Lloyd's* own account of what took place at Mr. *Faughner's* was, if he would leave in a short time after the property was sold, or with a month's notice, I would let him have it. He said he would leave within a month after he got notice. Further on in his evidence he said: “Mr. Matthews said he would not require a month's notice; he would move out in a few days after the place was sold and not put us to any trouble. I did not hire it to him for any period—it was only till I sold it—at \$4 a month; he did not go in as a monthly tenant. He had told the plaintiff he had sold the property. He said, “all right; he would leave as soon as he could get a house; he would put us to no trouble.”

* (*a*) The evidence was so noted. Perhaps it was, he was to leave in a month after the house was sold, if he could not get a house sooner.

The learned Judge told the jury that Mr. Lloyd, having conveyed the place, had no right to enter on the premises and remove the plaintiff's property. He asked the jury to say whether the original agreement was for a monthly tenancy, or a tenancy which would terminate on receiving a month's notice.

The jury found that the tenancy was to terminate on a month's notice, and found for the plaintiff, damages \$100.

The defendants' counsel objected to the charge of the learned Judge, contending that he should have left it to the jury to say whether the defendant acted under Mr. Wait's authority. This the learned Judge declined doing, as he saw no evidence justifying him doing so.

He also objected that the defendant having made the agreement with the plaintiff, he was the only person who could give the notice, and also that the only notice the plaintiff was entitled to was a notice of the sale.

The learned Judge gave leave to the defendants to move to enter a verdict for them if the Court should think on the finding of the jury the plaintiff was not entitled to recover.

In Michaelmas term, November 19, 1873, *Mackenzie*, Q.C., obtained a rule *nisi* to set aside the verdict and enter a verdict for the defendant on the second, third, and fourth issues, or any or either of them, pursuant to leave reserved, on the ground that on the evidence and finding of the jury a verdict should have been entered for the defendant on the said issues, or some of them; and on the ground that the plaintiff was let into possession of the premises in question under an agreement that he would leave as soon as the premises were sold—at all events, that he would leave on getting a month's notice; and that the premises were sold, and that the plaintiff had a month's notice of such sale before the alleged trespasses were committed; and that the agreement was that he was to get the notice of sale from Wm. G. Lloyd; and that the plaintiff had no right to the premises or the possession of them on the 9th of September, when the defendants entered; and that the jury found that he had a month's notice; or for a new trial, on the

ground that the verdict was contrary to law and evidence, and on the ground of misdirection and nondirection, in this, that the learned Judge should have left it to the jury as a matter of fact whether the defendants did not act under the authority of Wait, the purchaser; and that the learned Judge should have told the jury, if they found that the plaintiff agreed with Lloyd that he would give up the possession to Lloyd on getting a notice of the sale, that Lloyd was the proper person to give the notice and receive the possession from the plaintiff, then the verdict should be for the defendants; and that the learned Judge should have told the jury that there was an implied and express undertaking on the part of the plaintiff to receive the notice of the sale from the defendant Lloyd, having received notice of the sale from him the plaintiff was not in the lawful possession of the premises on the 9th day of September when the defendants entered; and that the learned Judge should have told the jury that all the plaintiff was entitled to was a notice of sale, and the happening of the sale itself put an end to the lawful possession of the property by the plaintiff as between the plaintiff and Lloyd, and entitled the defendants to enter to give the possession to Wait.

In Easter term, June, 4, 1874, *M. C. Cameron, Q. C.*, shewed cause. The moment the deed was executed the party to whom the land was conveyed could alone give the notice. The notice given was not a month's notice to quit. The finding of the jury was the same in effect as if they found that the plaintiff held as a monthly tenant. It is not a proper notice to quit, and Wait, the purchaser, should have given it. The defendants could not set up the purchaser's title unless they acted under his authority, and they did not shew they so acted. As to what notice a tenant is entitled to who is less than a yearly tenant, see *Doe Murrell v. Milward et al.*, 3 M. & W. 328; *Johnstone v. Hudlestone*, 4 B. & C. 922; *Kemp v. Derrett*, 3 Camp. 510; *Jones v. Mills*, 10 C. B. N. S. 788; *Right d. Flower v. Darby*, 1 T. R.

159, 162; *Doe Mann v. Walters*, 10 B. & C. 626; *Doe d. Lyster et al. v. Goldwin*, 2 Q. B. 143; *Doe d. Landsell v. Gower*, 17 Q. B. 589; *Huffell v. Armistead*, 7 C. & P. 56.

K. Mackenzie, Q. C., contra. It was not a tenancy—to create a tenancy there must be certainty. It was a mere tenancy at will, or license of occupation, and there was a sufficient demand to terminate it: *Arch. L. & T.*, 3rd ed., 34, 35; *Cartwright v. McPherson*, 20 U. C. R. 251; *Morton v. Woods*, L. R. 3 Q. B. 658; *Doe dem. Lyster et al. v. Goldwin*, 2 Q. B. 143; *Jones v. Phipps*, L. R. 3 Q. B. 567; *Doe d. Green v. Baker*, 8 Taunt. 241; *Doe dem. Lynde v. Merritt*, 2 U. C. R. 410. There was evidence to go to the jury that the defendants were acting under Wait. He had told Lloyd he had better give the plaintiff a month's notice. Wait had several times directed him to give him possession of the place. The moment the plaintiff's goods were put out Wait went in, and so affirmed the defendant's acts. He cited also *Hardy v. Briggs*, 14 M. & W. 457; *Jones v. Chapman*, 2 Ex. 803; *Newton v. Harland*, 1 M. & G. 644 (a).

March 2, 1875.—RICHARDS, C. J.—In *Jones v. Mills*, 10 C. B. N. S. 788, most of the cases as to the nature of weekly or monthly tenancies are referred to, and the leaning of the majority of the Judges is, that when no agreement has been made as to the terminating of the tenancy a notice of a week or a month would be necessary before the tenant could be ejected; but where there is an agreement that should prevail.

Here the jury have found that the tenancy was to terminate on a month's notice. Of course, if the analogy of a notice to quit when it was a yearly tenancy is to be carried out, the termination must be with the month of the tenancy, and not from the time of the giving of the notice.

But the evidence, viewed on the point most favourably to the plaintiff, is, that he was to have a month after the

(a) See also *Gibboney v. Gibboney*, ante p. 236.

place was sold, and we think this is what the jury meant by their finding.

The next question is, whether the notice to quit given by the defendant Lloyd is sufficient. *Doe Mann v. Wallis*, 10 B. & C. 626, and *Doe Lyster v. Goldwin*, 2 Q. B. 143, are to the effect that the notice should be given by the landlord in his own name, or by the agent in the name of the landlord.

But in *Jones v. Phipps*, L. R. 3 Q. B. 567, where the party beneficially interested, though not having the legal title, had dealt with the tenant as his landlord, and had given notice to quit in his own name, the Court, in an ejectment brought in the name of the persons holding the legal title and the person beneficially interested, held the notice sufficient.

The case of *Doe d. Lyster et al. v. Goldwin* 2 Q. B. 143, was referred to, and the conclusion arrived at was, that to be binding the notice must be one which is in fact, and which the tenant has reason to believe to be, binding on the landlord.

Mr. Wait, who purchased the property from Lloyd, stated that the latter informed him when he purchased that he could have possession of the store part at once and of the rest in a few days; that he had already given the plaintiff notice, and he would go out in a few days. Mr. Wait said he had better give him a written notice; that notice was given after the deed was signed; he saw the notice signed. Mr. Lloyd in his evidence stated he told the plaintiff he had sold; that he said, "all right, he would move out as soon as he could get a house, he would put them to no trouble." Mr. Wait further said that he had offered to pay the railway fare of the plaintiff's family to Owen Sound if they would leave the place, and that the plaintiff had agreed to do so, but afterwards declined leaving.

On the whole, we think there was evidence enough that there was notice given to the plaintiff of the sale and that the parties wished possession. It is not necessary that the notice should be in writing, and there seems to have been a

verbal notice before the deed was executed, and a written one after, and the plaintiff expressed his willingness to leave after these notices were given but eventually declined doing so, obviously with the intention of getting money for giving up possession.

If the plaintiff's holding here had been that he should leave in a month after Lloyd had let to another tenant, and a new lease had been made before the expiration of the month, *Blackford v. Cole*, 5 C. B. N. S. 514, is an authority that L'oyd would be sufficiently a reversioner to enable him to take possession for the purpose of giving possession to his tenant under the new lease, who, in the mean time, had not an *estate* in the land, but an *interesse termini*.

And in *Fox v. Macaulay*, 12 C. P. 298, in appeal, it was held that notwithstanding the second lease the owner of the reversion could bring ejectment against the overholding tenant to enable him to give possession to the new tenant.

Jones v. Chapman et al., 2 Ex. 803, is express authority that the defendants might shew, under the third and fourth pleas, that they entered as the servants of Wait and by his authority and command, if the tenancy had, at that time, been properly determined.

The difficulty is to say that there is evidence that they did so enter. It was for the defendants to make out their justification. There is no doubt that Wait was anxious to get possession of the premises, and was urging Lloyd to take steps for that purpose, and he so far intervened as to make direct offers to the plaintiff to leave the place, and he received possession immediately after Lloyd had removed the plaintiff's furniture, and it is probable everything the defendants did was with the consent of Wait, so far as he knew anything of what they were doing. The difficulty is to say how far there is any evidence that he authorized it to be done.

No doubt Wait was urging Lloyd to give him possession immediately, and that he had a right to demand this pos-

session from him, and if Lloyd omitted to give him possession he considered the latter liable to him on the covenants in his deed. That Lloyd had the same view, and it is probable, to relieve himself from the claim for damages which Wait might have under the covenants, took the steps complained of to dispossess the plaintiff and deliver possession to Wait.

If it is contended that Wait's taking possession immediately after what was done by the defendants, is a ratification of the acts, *Buron v. Denman*, 2 Ex. 167, seems to be an authority against that view. That was an action by the owner of slaves against the defendant for carrying away the plaintiff's slaves at the Gallenas on the western coast of Africa, north of the equator.

The maxim of "*omnis ratihabitio retrotrahitur et mandato equiparatur*" is referred to and discussed, and Baron Parke said, at p. 188 : " If an act be done by a person as *agent*, it is in general immaterial whether the authority be given prior or subsequent to the act. * * Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done *as agent* is equal to a prior authority."

Here the difficulty, as already observed, is, to say that the evidence shews that what was done by Lloyd was done by him as agent for Wait, and that a subsequent ratification, if made, would be sufficient.

In the case reported in 2 Ex., p. 167, the crown ratified the act of the defendant, and the Court held he was not responsible. Many of the cases on ratification are there referred to, as also in *Wilson v. Tumman et al.*, 6 M & G. 236, and notes.

It is suggested that Wait telling Lloyd to give a written notice is some evidence to go to the jury that Wait authorized what was done to be done. If so, it is slight evidence. If it had been left to the jury, and they had found for the defendant on it, perhaps we would not have interfered.

It may be that more evidence can be given as to the authority from Wait to the defendants to do the acts complained of.

On the whole, after going over the matter again with my learned brothers, and having consulted the learned Judge who tried the cause, we think, under all the circumstances, there should be a new trial, costs to abide the event.

MORRISON, J., concurred.

WILSON, J.—The case of *Jones v. Phipps*, L. R. 3. Q. B. 567, referred to by the Chief Justice, shews that if Lloyd had authority from Wait, in whom the legal estate was vested at the time the notice was given, to give such notice to quit, to determine the tenancy, that a notice given under such authority may be given in the agent's own name, without noticing the authority under which he was acting. Defendant, after being requested or notified to leave, promised several times to go out. He never made any difficulty as to any request or notice to leave being in Lloyd's name, or not being given by proper authority. I am of opinion the notice was good in law.

The verbal notice before given was also sufficient.

I think it is a matter of inference whether, when Lloyd turned plaintiff off he did so under the authority in fact of Wait, for whom he gave the written notice to quit, or assuming to act for him; and I am disposed to make that inference in his favour.

Rule absolute for a new trial.

DIAMOND V. REDDICK AND THOMPSON.

Water course—Natural stream diverted into a canal—Riparian rights.

The plaintiff claimed title under a deed from T. C. to R. F. C. made in 1845, granting a certain parcel of land in the Town of Belleville, described, being part of lot 3, in the first concession of Thurlow, situate on the west bank of the river Moira, "with an equal right to or privilege of the water from the dam conveyed through the canal to the premises aforesaid, he, the said R. F. C., being at all times at an equal expense in altering, repairing, and amending the dam aforesaid, with the others who participate in the benefit thereof," together with all houses, mills, &c., thereon erected. It was admitted that T. C. then owned lot 3, which included the river Moira and the banks on either side, and that he built the dam and made the canal in question before 1845. By this dam the water of the river was turned into the canal, at the foot of which the plaintiff's mill conveyed by said deed was situate. Defendants had a factory, also on the canal, above the plaintiff's mill, and they diverted the water from the canal, to the injury of the plaintiff's mill.

Held, that the plaintiff having his land on the canal, had as appurtenant to his mill the rights of a riparian proprietor; that the law applicable to natural streams was applicable also to the canal, which was a natural flow of water, though in an artificial channel; and a verdict for the plaintiff was sustained.

Semble, that the right to the water given by the deed was an equal right with those who *then* participated in the benefit of the water from the dam; but *quære* as to the meaning of the deed in that respect.

DECLARATION. First count: that the plaintiff was possessed of certain land and premises in the Town of Belleville, and was entitled to the flow of a certain stream or water course to and through the said land and premises; and defendants obstructed, kept back, and diverted the water of the said stream from the land and premises of plaintiff.

Second count: that the plaintiff was possessed of a certain mill in Belleville, and by reason thereof was entitled to the flow of a stream for working the same; and defendants of their own wrong diverted the water which the plaintiff was by right entitled to use away from the said mill.

Third count: that the plaintiff was in possession and occupation of a certain grist mill and premises, situate on the river Moira, in Belleville, and by reason thereof, and by a grant from the late Thomas Coleman, the original proprietor thereof, the plaintiff was and is entitled to the flow

of a certain quantity of water from the said river Moira, through a certain canal or artificial water course leading from a point above in said river down to the said mill for working the same, and defendants by opening a gate or sluice-way in a dam across said river, and by cutting the bank at the head of said canal or artificial water course, wrongfully diverted the water which the plaintiff by right ought to have and enjoy from the plaintiff's mill, whereby he was prevented from carrying on his business.

Fourth count: that before the committing of the grievances, &c., one Thomas Coleman, deceased, was proprietor and owner in fee of the land, premises, easements, &c., hereinafter mentioned, situate and being in and near the said river Moira, in the Town of Belleville, and by deed of bargain and sale, on the 7th March, 1845, granted and conveyed to Robert Frederick Coleman a certain portion of said land and premises as in said deed set forth, *together with an equal right* to the privilege of the water of said river from a certain dam across said river, conveyed and flowing through a certain canal or artificial water course, the property of the said Thomas Coleman, to the premises aforesaid, which water the said R. F. C., his heirs, &c., required and thereby acquired for the purpose of working and running a grist mill erected upon said land so conveyed, and situated at the foot of said canal or artificial water course; and that the plaintiff had by proper deeds of conveyance and by right of purchase become the lawful owner and possessor of said land and premises, hereditaments, easements, and water privilege so sold and conveyed to the said R. F. C. by the said Thomas Coleman, and the plaintiff is now in the lawful occupation and possession thereof, and is thereby entitled to use for the purpose of working said mill the water flowing through said canal in manner and quantity as granted to the said R. F. C., at the time of which grant the plaintiff avers that beside the said grist mill there was only one factory, then called the trip-hammer works, built at or near the said canal which used any of the water flowing from the said dam through the said

canal, which factory and premises, with the water privilege thereto belonging, is now occupied and enjoyed by one John A. M. Gilbert, who thereby alone has a right to share and enjoy with the plaintiff the water flowing through said canal. And that the defendants are in possession and occupation of a certain sash and blind factory, situate and being higher up on the said river Moira at or near the head of the said canal, which said sash factory was built long after the date of the deed from the said Thomas Coleman to the said R. F. C.: that defendants at various times and on several occasions before the commencement of this suit, and while the plaintiff was in the possession of his said mill and premises and easements, for the purpose of running and working the sash factory, opened a sluice-way in said dam and cut the bank of the said canal at or near the head thereof, and wrongfully diverted the water of the said river flowing from said dam through said canal to the said sash factory, and thereby deprived the plaintiff of the use of the water which by right he ought to have and enjoy, and which otherwise he would have had and enjoyed for the purposes of his said grist mill but for defendant's said wrongful acts, whereby the plaintiff was prevented from carrying on his business in as ample, sufficient, and beneficial a manner as he otherwise might and would have done.

Pleas. 1. Not guilty.

2. To the first count: that the plaintiff is not entitled to the flow of the stream or water course to and through the land and premises of the plaintiff as in said count is alleged.

3. To the second count: that the plaintiff is not entitled to the flow of said stream for working of said mill as in that count alleged.

4. To the third count: that the plaintiff is not entitled to the flow of the said quantity of water flowing from said river Moira through the said canal or water course as therein alleged.

5. To the fourth count: that Thomas Coleman did not convey to R. F. C., and the latter did not acquire the right,

nor has the plaintiff, as the assignee, grantee, or by any title derived from the said R. F. C., any right, nor is he entitled to use, for the purpose of working said mill, all the water flowing through said canal except what would be used by said Gilbert and those holding in his right, or to exclude all others from the enjoyment of the said right, or use one moiety of the water, nor has he an equal right or privilege only with said Gilbert and those claiming under him or in his right.

6. To the whole declaration: that at the time of the alleged grievance the defendants were possessed of a sash and blind factory, the occupiers whereof for 20 years before this suit enjoyed as of right and without interruption the right of diverting and using the water of said river for working said sash and blind factory as to the said factory appertaining, and the alleged grievance was a use by the defendants of the said right.

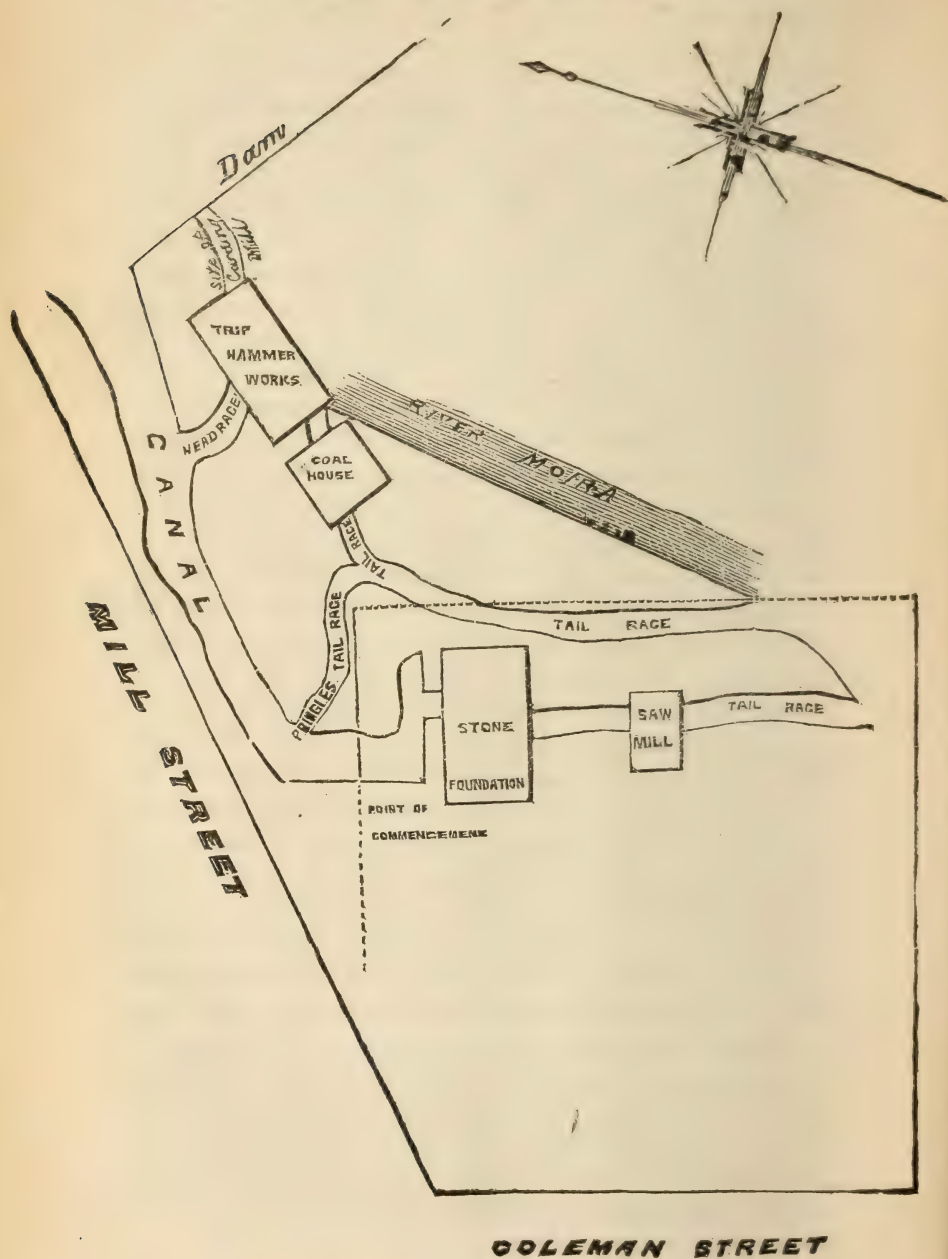
7. To the whole declaration: that long before the alleged grievances one Everett Hastings Coleman was seized in fee of a sash and blind factory, and said E. H. C., and all those whose estate he then had therein, from time immemorial enjoyed the right of diverting and using the water of the said river, which water was used by them at first for driving the machinery of a saw mill, and afterwards, having changed the said saw mill into a sash and blind factory, was used for working the said factory as to the said saw mill and sash and blind factory of the said E. H. C. appertaining. And the said E. H. C., being so seized as aforesaid before the alleged grievances, demised the said sash and blind factory with the appurtenances to said defendant Reddick to hold for five years from the 7th October, 1869, by virtue of which defendant Reddick, as such lessee and said Thompson as partner with him in said business, afterwards and before the alleged grievance, entered into said factory so demised, and became possessed thereof, and the alleged grievance was a use by defendants of said right.

Issue.

The cause was tried at the Spring Assizes of 1874, at Belleville, before S. Richards, Q. C., sitting for GALT, J., without a jury.

The plaintiff claimed title through mesne conveyances under a deed from Thomas Coleman to Robert Frederick Coleman, dated the 7th day of March, 1845, whereby, in consideration of natural love and affection and five shillings, he granted, bargained, sold, assigned, enfeoffed, conveyed, and confirmed unto R. F. C., his heirs and assigns, all and singular that piece or parcel of land situate in the Town of Belleville, in the County of Hastings, being part of lot 3, in the first concession of the Township of Thurlow, situate on the west side of the river Moira, and which may be better known as follows: that is to say, commencing at a post or mark near a large stone 36 feet from the north-west corner, and in a line with a stone building erected on the premises, being part thereof; thence easterly 84 feet to the tail race of the trip hammer works, and in a parallel with the north side of the aforesaid stone building; thence southerly parallel with the east gable end of the aforesaid stone building, intersecting the river Moira aforesaid, 264 feet; thence westerly ascending the bank of the river 275 feet, more or less, to the east side of Coleman street; thence along the east side of Coleman street 239 feet to a post planted by the street surveyor at the north-west corner of the kitchen of the said R. F. C.'s dwelling house; thence 66 feet along the east side of the road leading to Bleeker's Mills, commonly called Mill street; thence easterly 100 feet, more or less, to the place of beginning; with an equal right to or privilege of the water from the dam conveyed through the canal to the premises aforesaid, he the said R. F. C. being at all times at an equal expense in altering, repairing, and amending the dam aforesaid with the others who participate in the benefit thereof, together with all houses, out-houses, *mills*, buildings, and appurtenances, and all woods, ways, waters, and water courses thereon erected, lying and being, to have and to hold the same to the said R. F. C., his heirs and assigns forever.

The following plan will help to explain the premises:—



The execution of that deed and the subsequent mesne conveyances to the plaintiff were admitted.

It was admitted that Thomas Coleman was the owner in fee of lot 3, in the first concession of Thurlow, which included the river Moira and the banks on each side, and that he built the dam and made the canal shewn on the plan before 1845, and that while he was such owner he executed the deed of the 7th of March to R. F. C. above referred to.

It was also admitted that he went into possession under the deed, and continued in possession by himself and his tenants. The defendants drew water for their mill from the dam across the river, which turned the water into the canal, both of which are referred to in the deed from Thos. Coleman to R. F. C.

It was admitted that the plaintiff's grist mill was the stone building mentioned in the deed of 1845, and that the factory called "Gilbert's sash factory" was on the site of the old trip hammer works mentioned in the deed of 1845.

The defendant Reddick stated that in the fall of 1870 the plaintiff's grist mill had to shut down for want of water. When he wanted to run his factory he did so regardless of the grist mill. The opening into the flume of defendant's mill was lower than the entrance to the canal, and when defendants opened the gate into their flume the water would go into it instead of the canal. The water passed the head of their flume to get into the canal. The water was very shallow on the west side of the river at and above the entrance of the canal. In low water the grist mill would not have an equal share of water with defendants' factory. When defendants opened the gate to their flume it prevented the water from going either into plaintiff's or Gilbert's flume.

The plaintiff called a witness who worked at the place in 1860 and 1861, and also in 1871. He stated that in 1871, when the water got low, defendants' factory would stop the water from plaintiff's mill. He said that in 1860 and 1861 the mill plaintiff now owned would run in low

water when the trip hammer works could not. But defendants' mill and factory were not running then.

Another witness, who had known the premises for 20 years, stated that in 1856 he occupied defendants' factory; it was changed in that year from a saw mill to a sash factory; he occupied to about 1859 or 1860; the bottom of the floom, since he occupied the place, had been lowered, and the present floom would draw more water than the former one. When he was there both the grist mill and trip hammer works would shut down before the sash factory.

The plaintiff acquired title to the premises on 7th September, 1870, and claimed damages to 17th February, 1871, when the action was commenced.

It was agreed between the parties, that if the plaintiff was entitled to recover at all, the damages should be assessed at \$50.

At the close of the plaintiff's case defendants' counsel moved for a nonsuit on the following grounds:—

That he shewed no right to the flow of water as claimed in the declaration.

That the words in the deed of 1845 did not create any right which would pass as appurtenant to the land.

That the plaintiff could not recover as a riparian proprietor, because the point where plaintiff's land touched the river was below the dam from which defendants drew the water, and the plaintiff has shewn the erection of the dam more than twenty years before the bringing of this action.

That it was not shewn that a greater quantity of water was used by defendants than those claiming under Thomas Coleman had a right to use, notwithstanding the deed of 1845: *Stockport Water Works Co. v. Potter*, 3 H. & C. 300.

There were other objections taken as to the plaintiff's claim under the mortgage given by Robert Frederick Coleman not passing the title, and also conveyances from the sheriff under sales against executors. These objections are referred to in the rule *nisi*, but as the points were given up on the argument they are not necessary to be noted.

The learned Queen's Counsel overruled all the objections, but gave leave to defendants to move to enter a nonsuit if the Court should think on the evidence the plaintiff was not entitled to recover.

He found for the plaintiff, damages \$50.

In Easter term, May 21, 1874, *Bethune* obtained a rule *nisi* to set aside the verdict, and to enter a verdict for the defendants under the Law Reform Act of 1868, on the grounds that the plaintiff shewed no title in himself sufficient to maintain the action either upon the assignment of mortgage from the Trust and Loan Company of Upper Canada to Miller, or under the sheriff's sale in the action of Bell against Miller: that the mortgage from the Trust and Loan Company from Robert F. Coleman did not convey any right to the water such as the plaintiff in his declaration claimed, or such as would enable him to maintain an action against the defendants under the circumstances of this case:—

That the deed to Robert F. Coleman from Thomas Coleman did not pass any interest in the water conveyed through the canal above the land granted to Robert F. Coleman, such as would enable the assignee of the said grant of the water to maintain an action in his own name against a riparian proprietor higher up the stream for the use by him of the water, even if he abstracted it from the said canal: that the plaintiff was not a riparian proprietor, and could not maintain an action as such for what was done by the defendants in this action: that the sale and conveyance by the sheriff under the various executions in the said case of *Bell v. Bell* were and are void, and passed no estate of the real representatives of the said Robert F. Coleman or of the said Robert F. Coleman at the time of his death in any part of the said property, but only the interest of Anne Maria Coleman as executrix of the said Robert F. Coleman in the said lands in the hands of Thomas Ferguson Miller, executor of the last will and testament of the said Anne Maria Coleman, and it did not appear that either the said Anne

Maria Coleman or Thomas Ferguson Miller possessed any interest in the said lands, and they had not, nor had either of them, any saleable interest therein: that no judgment and execution to support the said deed were shewn: that at all events it did not appear that the defendants, who were lessees of Everett H. Coleman, who was the grantee of Thomas Coleman in respect of the parcel of land on which the defendants' mill stood, had used a greater quantity of water than of right they were entitled to use: that the plaintiff, if entitled to any right, was only entitled to use a proportionate share of the water of the said canal along with others who drew water directly from the same: that even if the plaintiff were now entitled to all the rights granted by Thomas Coleman to Robert F. Coleman, he was not entitled to maintain an action against the defendants merely for using the water as riparian proprietors at a place higher up the stream: and that upon the whole case the defendants were and are entitled to a verdict.

In Michaelmas term, November 27, 1874, *Diamond* shewed cause. The deed from Thomas to Robert F. Coleman is dated in March, 1845. The plaintiff derived title through a mortgage from Robert F. Coleman to the Trust and Loan Company, dated 27th November, 1851, and assigned by the Trust and Loan Company to Thomas Ferguson Miller, who, on 7th September, 1870, conveyed to the plaintiff. The description in the deed from Coleman to the Trust and Loan Company to Miller differs a little from that in the deed from Thomas to R. F. C. The deed from Robert Coleman to the Trust and Loan Company must be held to cover all the interest Robert had in the property. Miller went into possession under the mortgage, and had possession several years. The right to the enjoyment of this water is an easement, and will pass by the grant; and the mortgagee in possession, or their assignee, can maintain this action for disturbing the easement. The words in the grant by Thomas Coleman are, "*with an equal right to or privilege of the water from the dam con-*

veyed through the canal to the premises aforesaid, he, the said Robert F. Coleman being at all times at an equal expense in altering, repairing, and amending the dam aforesaid with the others who participate in the benefit thereof." This creates either a right to the use of the water equally with the grantor or one-half or equally with those who then had the use of it. He cited: *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Nuttall v. Bracewood*, L. R. 2 Ex. 1, 13; *The Governor and Company of Chelsea Waterworks v. Bowley*, 15 Jur. 1129; *Goddard on Easements*, 82; *Watts v. Kilson*, L. R. 6 Ch. 166, 175; *Ivimey v. Stocker*, L. R. 1 Ch. 396; *Wood v. Waud*, 3 Ex. 748; *Pyer v. Carter*, 1 H. & N. 916; *Hall v. Lund*, 1 H. & C. 676; *Richards v. Rose*, 9 Ex. 218; *Murchie v. Black*, 19 C. B. N. S. 190; *Young v. Wilson*, 21 Grant 144; *Wardle v. Brocklehurst*, 1 E. & E. 1058.

Bethune, contra. The case of *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300, is later than that in *Ellis & Ellis*. The judgment of Bramwell, B., in that case is in favor of plaintiff, but the judgment of the Court does not sustain the plaintiff's case. If the water is to be considered as two streams, one through the canal and the Moira, there is nothing to show that the elder Coleman intended to deprive himself of the right to use the water to its full extent in the main body of the stream: see judgment of Pollock, J., at p. 326 of 3 H. & C., and also *Hill v. Tupper*, 2 H. & C. 121. It was only intended to grant the equal right of the water flowing through the canal. The term *equal* does not necessarily mean half. It may be equal as to the riparian rights which each owner had on the stream. Suppose the main stream should become deepened from natural causes, and the water flowed through the main channel, would the persons using the water on the other bank of the river be liable to plaintiffs for diminishing the flow of the water? The provision that R. F. C. was to contribute towards the repair of the dam in proportion to the benefits received, shews that it was not to be equal expenses; if the use was to be equal the expenses of repairs should be equally

borne. *Edinburgh Life Insurance Co. v. Barnhart*, 17 C. P. 63, is an authority in accordance with *Wardle v. Brocklehurst*, that this action will not lie at law. If the case were in Equity, the language of the grant would be interpreted and acted on: *Angell on Water Courses*, 6th ed. sec. 96 (*a.*) As to the title, if the right is an easement, it would pass, and the mortgagee's title would be sufficient to maintain the action: *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Polden v. Bastard*, L. R. 1 Q. B. 156.

March 2, 1874. RICHARDS, C. J., delivered the judgment of the Court.

The cases cited on the argument, and some of which I shall quote at considerable length, seem to me to shew that the plaintiff has a right to maintain this action as an easement appurtenant to the grant of his mill, and as a proprietor virtually owning land on the stream (the Moira); and although the water in which he was beneficially interested flowed through an artificial water course (the canal), yet he had in fact in relation to his mill the rights of a riparian proprietor. This seems to be established by the case of *Nuttall v. Bracewell*, L. R. 2 Ex. 113, where Channell, Baron, explains the views of the majority of the Court in *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300, and in effect decides that the plaintiff's right here is that of a riparian proprietor, Thomas Coleman, who constructed the canal, and made the conveyance to Robert F. Coleman, being in fact at the time of such conveyance the riparian proprietor on both sides of the stream, and having the right to divide it as he pleased; and, to use the words in the case referred to in that case, this canal is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz., to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel.

In the *Stockport Waterworks Co. v. Potter*, the plaintiffs took water out of the Mersey. The deed from the riparian owner was the full and free use of the water, which shall at any time be raised by pumps, &c., and the right of diverting the stream of the Mersey from the weir and carrying the same through a canal through the estate called the Woodbank estate, &c.

The majority of the Court held, p. 326, "that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us he can have them against the grantor but not so as to sue other persons in his own name for an infringement of them." The case of *Hill v. Tupper*, 2 H. & C. 121, * * is an authority that a person cannot create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption by a third party. The case where a riparian proprietor makes two streams instead of one and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights."

Baron Bramwell, in his judgment, said, at p. 321: "Suppose a riparian proprietor on both sides for a great length wholly alters the course of the stream, could he not effectually complain of a fouling of the water in the new course? Suppose besides the new course he allowed the old one to continue, the stream running in both, could he not then maintain actions for the damage done to either? If he

could, could not his grantee of lands on the new stream, and if such grantee could, why cannot the plaintiffs? If the defendants' argument is well founded, it will follow that when the owner of land on a stream has built a mill alongside the stream with a cut or lead to it, and sells the mill, but not the natural watercourse, the owner of the mill can maintain no action against a riparian owner above who abstracts the water. I cannot think this is so."

He refers to *Keppel v. Bailey*, 2 M. & K. 516, and argues that new rights of property cannot be created, but that the rule did not interfere with the case. There it was held that the burden put on the land by the former owner would not attach to it in the hands of the assignee. "Here," he adds, "no doubt it can be, that is to say, on the lands of the riparian proprietors, the Marsdens."

The subsequent case of *Nuttall v. Bracewell*, L. R. 2 Ex. 1, already referred to, explains the *Stockport Waterworks Co.* case so far as it is necessary to apply its principles to this case.

The important facts of that case seem to have been that the owners of plaintiffs' mill by agreement with the owner of the land which defendant owned, constructed a goit for the conveyance of water from the defendant's land and about 50 yards through it to the land of the plaintiff, and then to his mill, and for this privilege 5s. a year was paid from 1804, when the goit was made, to the time of bringing the action in 1860. The water of the stream flowed in part down the goit towards plaintiff's mill, and the residue running in the old channel, so the water of the stream entered the land on which plaintiff's mill stood in two channels. No one was injured by the making or the use of the goit. The defendant obstructed the water of the stream above, and the jury gave £250 damages. The defendant contended the plaintiff was a mere licensee, and had not any property.

Martin, B. said, at p. 10: "The right to a flow of water in a goit is a well-known easement, and is an incorporeal hereditament, and although it is not competent

for an owner of land to render it subject to a new species of burthen at his fancy or caprice, the burthen of one man's land being subject to the right of another to have a flow of water running through it to work his mill, is as old as the law itself, and in my opinion is the subject of property and of grant and not merely of license."

In the conclusion of his judgment it is stated that the *Stockport Waterworks Co. v. Potter* was the sole authority relied upon by defendant's counsel, that it differed from the case before him, and he declined to extend it, even if it was capable of being extended, to hold the plaintiff had no right of action.

Bramwell, B., adhered to the judgment in the *Stockport Waterworks Co. v. Potter*, and distinguished the case from *Hill v. Tupper*. If the grantee of the right to use the pleasure boats had been interfered with in using the boats, he might have maintained an action, but he had not the right to maintain an action against another grantee for rowing a boat on the canal when he was not interfered with.

Channell, B., in giving his own judgment, and that of Chief Baron Pollock, distinguished between that case and the *Stockport Waterworks Case*, at p. 13: "If, however, two adjoining riparian proprietors agree to divert the stream, so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different. What is done is apparent to all, and any use that may be made of the new stream, as to turn a mill for instance, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of the water, while it in no way diminishes or affects the rights of other proprietors."

He then quotes the passage from the judgment in the case in 3 H. & C. 327, and proceeds, p. 14: "Now, in the present case Coates mill (the plaintiff's) is on an estate abutting on the river. Prior to 1804, the water

came to the mill from the stream through a goit and a reservoir, all on the mill owner's estate; since then there has been either an additional supply of water or a substituted one I am not sure which, through a goit leaving the river higher up on the estate of another proprietor. Now it seems to me that the goit is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz.: to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel."

I will also quote at some length from *Watts v. Kitson*, L. R. 6 Ch. 166, in which I think doctrines are laid down which will sustain the plaintiff's right to maintain this action without the express words of grant contained in the deed from Thomas Coleman. The grant by Thomas Coleman conveyed the land to Robert F. Coleman, together with all houses, outhouses, *mills* and buildings. For the enjoyment of the mill it was necessary to have the water flowing to it, and the case in L. R. 6 Ch. is an authority that this would pass by the grant. The facts in that case necessary to be referred to were as follows:—

In 1860 the owners of properties A. and B. made a drain from a tank on property B. to a lower tank on the same property, and laid pipes from the lower tank to cattle sheds on property A. for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A. to the plaintiff, with all waters, &c. to the same hereditaments and premises belonging, &c., or with the same or any part thereof held, used or enjoyed as a part thereof or appurtenant thereto. The plaintiff used the water after his conveyance until defendant, a subsequent purchaser of property B., stopped it:—Held, the water course was a continuous easement necessary for the use of property A., and would have passed by implication: that the plaintiff was entitled to the use of the water on the con-

veyance of that property without any words of grant; and supposing it only is convenient, and not necessary, the general words were sufficient to pass it:—Held, further, the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle sheds.”

Mellish, L. J., said, at p. 174: “There was an actual construction on the servient tenement extending to the dominant tenant by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. * * * It was a watercourse with the premises at the time of the conveyance, used and enjoyed.”

And at p. 175 he says: “We think the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water. * * We are also of opinion, having regard to the general words of the conveyance, that the language of the conveyance was sufficient to pass the watercourse even if it was not necessary, but only convenient for the use of the premises.” *Pyer v. Carter* was approved of.

These authorities, I think, shew that plaintiff has a right to maintain this action both as a riparian proprietor and as claiming under the grantee of the easement. The defendant by his own evidence admits that he has taken more than his share of the water, and therefore this verdict must be sustained, and it is not necessary to decide whether by the grant to Robert F. Coleman the right of the flow of half the water of the stream passed to him or not.

As at present advised, however, I am inclined to think that the equal right to or privilege of the water from the dam conveyed through the canal to the premises aforesaid, he the said Robert F. Coleman being at all times at an equal expense in altering, repairing, and amending the dam aforesaid *with the others who participate* in the benefit thereof must

be the equal right with the others who *then* participated in the benefit of the water from the dam and had the right to enjoy it. It seems to me that Thomas Coleman could not by selling town lots adjoining the Moira above the dam, say to 100 people, give them all an equal right to the flow of the water with Robert F. Coleman.

In that view the right of Robert F. Coleman to the water power would be of little use. Every time another proprietor had an interest in land adjoining the river, the right of the mill owner to the flow of the water would be diminished, and that could never have been the intention of the parties.

Another view is, that the flow of a reasonable portion of the water then passing down the stream for the supply of the mill passed to the grantee, and to that extent the mill premises was the dominant tenement, and that no subsequent grant by Thomas Coleman could derogate from that grant, and that as long as there was a sufficient flow of water in the stream to drive the mill the owner of the mill should have it; or it may be the effect of the grant would be that if the whole body of the stream diminished, then that the portion granted to Robert F. Coleman would diminish in a proportionate ratio. There may be also other views taken as to what would be the rights of the parties.

As already observed, it is not necessary for us to decide this point now, and if we were of opinion that the right was to be exercised in common with the other parties who then participated in the benefit of the water, it was not shewn in evidence who those parties were. On the whole, we think the defendants' rule must be discharged.

The following being abstracts of some of the cases, may be inserted here for convenience of reference:

Sampson v. Hoddinott, 1 C. B. N. S. 590. Where water was detained so as to reach plaintiff's place at a time when not so favorable for irrigation as formerly, an action held maintainable. Where the plaintiff shews an obstruction of right it is sufficient without shewing

damages. The rights of the riparian proprietor are limited to *natural streams*, and do not attach to artificial canals or streams.

Polden v. Bastard, L. R. 1 Q. B. 156: I give to W. the house I now live in, with the outhouses, &c. I give to my niece C. the house, &c., as now in the occupation of A. A. was in the habit of using the well on the premises devised to W.:—Held, this devise did not create the easement to C. and her tenants to use the well on the place devised to W. If it had been—I devise the house as now *enjoyed* by A., then it might under *Bodenham v. Prichard* 1 B. & C. 350, be considered as passing the easement to C.

Where the owner could not claim in law the easement, a Court of Equity would restrain the party against whom the right existed, and all claiming under him from interfering with the flow of the water necessary for the working of the mill: *Edinburgh Life Insurance Co. v. Barnhart*, 17 C. P. 63.

The plaintiffs obtained a grant of the exclusive right of using pleasure boats for hire on a canal:—Held, the grant did not create an estate in the plaintiff to enable him to sue in his own name a person who disturbed his right by using pleasure boats for him on the canal. *Keppell v. Bailey*, 2 M. & K. 517, followed, on the ground that incidents of a novel kind cannot be devised and attached to property at the fancy of its owners: *Hill v. Tupper*, 2 H. & C. 121.

Ackroyd v. Smith, 10 C. B. 164, decides that it is not competent to create rights unconnected with the use and enjoyment of land and annex them to it so as to constitute a property in the grantee.

In *Young v. Wilson*, 21 Grant 144, many of the cases are reviewed, and it was held that where there was an existing millrace over land and the mill and a portion of the land was not covered by a mortgage, which extended over the part where the mill race was: that the mortgagor impliedly reserved the mill race as an easement appurtenant to the mill, though not so mentioned in the mortgage. This case refers to *Pyer v. Carter*, and *Polden v. Bastard*.

Where by agreement with the owner certain lots were sold, and houses were to be built on certain terms and in a certain manner, the defendant, having complied with the agreement, was held not liable for injury to the plaintiff's wall in carrying out the agreement, under the terms of which both had in fact purchased : *Murchie v. Black*, 19 C. B. N. S. 190.

A lease may be explained by previous enjoyment, and thus explained, there was, in this case, an implied grant that the lessee might use the stream for the purpose of his business, discharging dye from bleaching process. The lessor could grant to the plaintiff no more right than remained to him after his lease to the defendant : *Hall v. Lund*, 1 H. & C. 676.

This was sustained by *Ewart v. Cochrane*, 4 Macq. Sc. App. 117.

Where several houses are built in a row, the presumption is, that there is a reservation of mutual support by the walls of each, where all parties drew the title from the same source : *Richards v. Rose*, 9 Ex. 218.

After a grant that a stream shall flow in a free and uninterrupted manner, the water course cannot be diverted by a person claiming under the grantor : *Northam v. Hurly*, 1 E. & B. 665 ; *Whitehead v. Parks*, 2 H. & N. 870.

See also : *Whaley v. Laing*, 2 H. & N. 476 ; 3 H. & N. 675 ; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300 ; *Beeston v. Weate*, 5 E. & B. 986 ; *Nuttall v. Bracewell*, L. R. 2 Ex. 1.

Rule discharged.

BENNER V. CURRIE.

Creditor of company—Action against shareholders—Set-off.

Action against defendant as a shareholder in a Company incorporated under the 27 & 28 Vic, ch. 28, by the plaintiff, a creditor of the Company, alleging a judgment recovered and *fi. fa.* returned *nulla bona*. Plea, on equitable grounds, a set-off due to defendant by the Company, on the common counts, and on a judgment recovered by the defendant against the Company, on which a *fi. fa.* had been returned *nulla bona*.

Held, per GWYNNE, J., that the plea formed no defence: for the plaintiff was not claiming in right of the Company, but by virtue of a specific statutory remedy; and the decision in *Macbeth v. Smart*, 14 Grant 298, was in principle applicable, notwithstanding the fact of defendant having a judgment and execution.

DEMURRER. Declaration: that the defendant was, at the time of the recovery of the judgment by the plaintiff against The Lake Superior Navigation Company (Limited), hereinafter mentioned, and still is, a shareholder in the said Company holding four shares, on which, at the commencement of this suit, there was due and unpaid the sum of \$800; and on the 11th of February, A.D. 1874, in the Province of Ontario, in a suit then depending between the now plaintiff and The Lake Superior Navigation Company (Limited), in Her Majesty's Court of Queen's Bench at Toronto, being a Court of the said Province of Ontario, duly holden and having jurisdiction in that behalf, the plaintiff recovered judgment against the said Lake Superior Navigation Company (Limited), by the judgment of the said Court the sum of \$600 for a debt due from The Lake Superior Navigation Company (Limited), to the plaintiff for brokerage, commission as per account rendered by the plaintiff and admitted by the said Lake Superior Navigation Company, (Limited), and the sum of \$18 for costs of the said suit, which said sums of money and interest The Lake Superior Navigation Company (Limited) were, by the said Court, adjudged and ordered to pay to the plaintiff, and which sums together amount to the sum of \$618, and thereupon, on the 14th of February, A.D. 1874, the said plaintiff caused a writ of

feri facias to be issued out of and under the seal of the said Court, directed to the sheriff of the County of Grey, commanding him that of the goods and chattels of The Lake Superior Navigation Company (Limited) he should cause to be made the said sum of \$618; and the plaintiff avers that on the 2nd of March, A.D. 1874, the said sheriff caused a return to be made to the said writ of *feri facias* that the said Company had no goods and chattels in this bailiwick whereof he could cause to be made the said sum, &c., and the said judgment is still in force and unsatisfied; and that the said Lake Superior Navigation Company (Limited) is a company incorporated under the provisions of an Act of the Parliament of the late Province of Canada, passed at a session of the said Parliament held in the 27th and 28th years of the reign of Her Majesty Queen Victoria, ch. 23, intituled "An Act to authorize the Granting of Charters of Incorporation to Manufacturing, Mining, and other Companies," by letters patent issued by the Lieutenant Governor of the Province of Ontario, under the provisions of the said Act, on and bearing date the 25th of February, A.D. 1871; and by reason of the provisions of the said Act, the said judgment so recovered by the plaintiff against the said Company, and the return of the said execution unsatisfied, the said defendant, as such shareholder, became liable to the said plaintiff as a creditor of the said Company as aforesaid to the amount of the said judgment, the same not exceeding the amount not paid up by him on the shares held by him in the said Company.

Seventh plea, on equitable grounds: that at the time of the commencement of this suit, the said The Lake Superior Navigation Company (Limited) was and still is indebted to the defendant in an amount equal to the amount alleged to be due and unpaid by the defendant on his said shares, for money payable by the said Company to the defendant for goods sold and delivered by the defendant to the said Company, and for work done and materials provided by the defendant for the said Company at the request of the said Company, and for interest upon money due from the

said Company to the defendant, and forborne at interest by the defendant to the said Company at the request of the said Company, and for money found to be due from the said Company to the defendant on accounts stated between them, and for money payable by the said Company to the defendant upon a judgment recovered by the defendant on 23rd December, 1873, in Her Majesty's Court of Common Pleas, at Toronto, in the name of John W. Fletcher, against the said Company for \$582.46, together with \$18.50 for his costs of suit; and upon which judgment a writ of *fieri facias* was issued out under the seal of the said Court of Common Pleas, directed to the Sheriff of the County of Simcoe, commanding him that of the goods and chattels of the said defendant he should cause to be made the amount of the said judgment, and upon which writ of *fieri facias* the said sheriff caused a return to be made that the said defendants had no goods and chattels in his bailiwick whereof he could cause to be made the amount of the said judgment, and which said judgment still remains in force and unsatisfied, which said amount and moneys the defendant is willing to set off against the amount alleged to be due and unpaid on his said shares, and against the plaintiff's claim in respect thereof.

Demurrer to said plea, on the grounds: 1. That in an action like the present the defendant cannot set off the amount of the judgment alleged to be due to him from The Lake Superior Navigation Company (Limited) against the amount due and unpaid by him on his shares in the said Company.

2. The said defendant admitting by his said seventh plea that there is an amount unpaid on his shares, is liable for that amount towards payment of the plaintiff's claim, and cannot set off any claim he may have against the said Company against the claim of the said plaintiff.

3. The said plea as a defence is not a plea of equitable set-off, but amounts to nothing more than a legal set-off attempted to be set up on so-called equitable grounds. The plea is bad at law and cannot be sustained, and

no grounds exist whereby it can be sustained as an equitable plea.

Joinder.

February 6, 1875. The demurrer was argued. *M. C. Cameron*, Q.C., with him *Snelling*, for the plaintiff. There can be no set-off. The Act gives a personal, individual, and original right to the creditor as against the individual shareholders, a right which is to continue until the whole of their stock is paid up. And as the Act makes the shareholder so personally and originally liable, it follows that the liability can only be discharged by the payment of the full amount and his stock, and that consequently set-off between the creditor and the Company, which is *quoad* the creditor's rights merely as a third party, and cannot affect those rights. They referred to *Grissell's Case*, L. R. 1 Ch. 528; *Black's Case*, L. R. 8 Ch. 254; *Ryland v. Delisle*, L. R. 3 P. C. 17; *Waterman* on Set-off, 187, 188, 191, 395, and the cases there cited, and to 27 & 28 Vic. ch. 23.

J. K. Kerr, contra, referred to *Brighton Arcade Co., Limited*, v. *Dowling*, L. R. 3 C. P. 175; *Smart v. Macbeth*, 13 C. P. 27; *Woodruff v. Corporation of the Town of Peterborough*, 22 U. C. R. 274, as shewing that the set-off as here pleaded, existed, and that the plea was a good defence.

March 4, 1875, GWYNNE, J.—The defendant, at the time of the recovery by the plaintiff of a judgment against The Lake Superior Navigation Company (Limited), a company incorporated by letters patent issued under the provisions of 27 & 28 Vic. ch. 23, was a shareholder in that company.

The 27th section of this Act enacts that "Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by

any creditor, before an execution against the Company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable, with costs against such shareholders."

The plaintiff recovered a judgment against the Company for \$618, debt and costs, and issued execution thereon against the goods and chattels of the Company which has been returned with a return of *nulla bona* thereon, and the plaintiff now seeks to recover the amount of his judgment by execution against the defendant to an amount equal to his unpaid stock in the Company.

The defendant for defence upon equitable grounds pleads, by way of set-off that he, although a shareholder in, is also a creditor of, the Company for goods sold and delivered to the Company, and for money lent and for money found due upon an account stated, and for interest, and also for money payable by the Company to the defendant upon a judgment recovered by the defendant on 23rd December, 1873, in the name of one John W. Fletcher against the company for \$600, upon which judgment also an execution has issued against the goods and chattels of the Company, which has also been returned *nulla bona*, and which is still wholly unpaid and unsatisfied.

The point which is thus raised has been expressly decided by the judgment of the Court of Error and Appeal, in *Macbeth v. Smart*, 14 Grant 298.

It has been contended that the fact of the judgment against the company and the returned execution thereon, which the defendant pleads by way of set-off against the plaintiff's judgment and execution, so distinguishes this case from *Macbeth v. Smart* as to make that decision inapplicable to the determination of the present case; but waiving, for the sake of argument, all objection as to the mode in which the judgment relied upon by the defendant is pleaded, I am of opinion that the principles upon which the decision in *Macbeth v. Smart* rests equally exclude the right of a shareholder in a Company such as this is, who is also a creditor of the Company by judgment, to set off that

judgment against the statutable remedy of an outside execution creditor of the Company, seeking to enforce the remedies given him by statute against the individual shareholders to the amount of their unpaid stock as if the debt sought to be set off was by simple contract.

No doubt that one of the learned judges, who was a dissentient in that judgment, expressed the opinion that it was clear that a shareholder, by suing the Company and getting judgment for a debt due to him, may, on his execution being returned unsatisfied, set off in equity the amount of his execution against his own unpaid stock; but as I have said, the judgment of the Court and the principle upon which it proceeded is wholly at variance with the recognition of any such right of set-off as against a judgment creditor of the Company seeking to enforce his statutory remedy against the unpaid stock of the shareholder.

The whole argument in support of the defendant's contention is based upon the fallacy that the plaintiff's remedy against the shareholders to the amount of his unpaid stock is asserted in the right of the Company—that is to say, as if he was assignee of the Company's right to recover the unpaid stock from the shareholder.

It is in the assertion of no such right that the execution creditor proceeds against the shareholder in respect of his unpaid stock in order to enforce satisfaction of his judgment against the Company. The Company itself could have no cause of action except for calls already made.

The creditor's right is quite irrespective of calls, and is equally effectual whether any have or have not been made, so long as the stock is unpaid. His proceeding against the shareholder is in the nature of a *scire facias quare executionem non*. He claims not as a creditor of the individual shareholder at all—there is no mutuality of debts whatever between them—what he claims is a right to a statutory remedy given to him to reach certain specific assets of the Company, namely, the stock not paid up, whether called for by the Company or not.

A shareholder, who is himself an unsatisfied judgment creditor, can have, *to say the least*, no better remedy than the unsatisfied judgment creditor of the Company who is not a shareholder.

They may both have the like remedy against the assets of the Company, their common debtor, namely, that which is given by the statute to all unsatisfied judgment creditors, but how can it be supposed that in such a case the doctrine of set-off could be appealed to in favor of one creditor to bar the remedy of the other. The first judgment creditor who makes use of the statutory remedy to reach the assets of the Company must prevail, and if the shareholder, who is also a judgment creditor, cannot, by reason of his being a shareholder, reach with an execution his own unpaid stock, that circumstance is not to deprive the outside judgment creditor of the remedy which the statute gives to him.

Nor is a person in the position of the defendant in any manner unjustly prejudiced by thus holding, for if there are other shareholders who have stock in the company not yet paid up, the defendant, upon satisfying the plaintiff's judgment to the amount of the defendant's own unpaid stock, can assert the same statutory remedy in his own interest to the amount of his judgment against the unpaid stock of the other shareholders; and if there be no such other shareholders, and the defendant is the only one having stock unpaid, and so the Company may be said to be insolvent, upon every principle of justice the claim of the judgment creditor who is not a shareholder should have preference over that of the shareholder.

The effect of the statute is, in my judgment, that payment to the amount of his unpaid stock is the only answer a shareholder can offer to the statutory remedy. So long as there is *stock unpaid*, it must be liable to execution or the statute is nugatory.

Upon the assumption that the plaintiff's right could only be asserted as the right of the Company, the case of *The Brighton Arcade Company Limited, v. Dowling*, L. R. 3

C. P. 175 was cited, but even for the point there determined the authority of that case must be taken to be much shaken, if not wholly displaced, by the judgment of Lord Chancellor Selborne and the Lords Justices in *Re Paragassu Steam Tramroad Co., Black & Co.'s Case*, L. R. 8 Ch. 234. The language of this judgment and the principles upon which it proceeded are very appropriate to this case before us, which is one in which the Legislature has provided a remedy to creditors of an insolvent Company analogous to, although not so effectual and equal as that provided by the Winding-up Act in England.

There a contractor had agreed with a Company to supply them with steam engines at a fixed price and to take shares in the Company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the Company, which were not taken by the Company and paid for. On a call being made by a liquidator in winding up, it was held that the contractor could not set off the amount due to him from the Company against the amount due by him on the calls.

The Lord Chancellor, referring to the case in L. R. 3 C. P. 175, says, at p. 261: "I think it right, rather in consequence of what was said by the Court of Common Pleas in the case of *The Brighton Arcade Co. v. Dowling* than for any other reason, to observe that I entertain no doubt whatever that *Grissell's Case* was decided on the soundest principles. What is the ordinary law of set-off? It is what in the civil law was called compensation, and simply means this: that when you have got two cross demands of a nature substantially the same, and due to and from A. and B. in the same right—that is to say, when the one is a creditor in his own right and debtor also in his own right to the other—the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same

at law but different in equity, set-off would not be allowed here; nor do I suppose that in the present state of the law, it would be allowed at common law either."

Again, he says, p. 262: "The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear upon the subject."

This language of the Lord Chancellor appears to me to be quite apposite to the point before me, and to the Act of Parliament under which the plaintiff's claim is asserted here.

The Lord Chancellor proceeds to say, p. 262: "As the case in the Common Pleas substantially is not before us I think it wiser and better not to say more on that subject than this: that, although recognising the soundness of *Grissell's Case*, when the winding-up is by the Court, or voluntary under the supervision of the Court, and professing not to depart from it, the Court of Common Pleas has thought it inapplicable to a case of voluntary liquidation where the Court has not intervened; and, in order to arrive at that conclusion, has certainly shaken, by some of the observations made, a portion of the foundation for the conclusion in *Grissell's Case*. * * The Court of Common Pleas apparently thought that a voluntary liquidation under the Act is a matter in which the shareholders merely are concerned. Whenever that subject shall be required to be reviewed and further considered, I hope attention will be paid to several sections in the Act, to which, as far as I can see, attention was not particularly directed on the occasion."

Lord Justice Sir W. M. James entirely concurred in these observations, as also did Lord Justice Sir G. Mellish, who added, at p. 264: "The effect of the 38th section of the Act,

of 1862 is clearly to make every person who is at the time of the winding up a shareholder liable to contribute to the debts of the Company, that liability being limited to the amount unpaid upon his shares. If there be an amount which at the time of the winding-up is unpaid on his shares, then he is liable to contribute that amount towards payment of the debts of the Company."

And again he says, at p. 265: "It is quite clear that the Company cannot, by making an agreement with a particular shareholder, save him from that liability which the Act of Parliament has imposed upon him."

In *Ryland v. Delisle*, L. R. 3 P. C. 176, to a claim precisely similar to that of the plaintiff here the defendant in the Quebec Courts put in a plea of compensation, and alleged that a sum of £1000 voted to him for services as President of the Company was credited to him in the books of the Company against stock taken by him to the same amount in the shares of the Company, and that the sum so credited to him in the books of the Company for his salary as President of the Company operated as an extinguishment by compensation of any amount which he might have owed the Company upon any shares of stock subscribed for by him and unpaid. Calls to the amount of £100 only had been made by the Company, and to that amount the entry to the credit of the defendant in the books of the company was allowed to operate as compensation, but as to the residue it was held that the judgment creditor's right to enforce his execution against the unpaid stock of the defendant was unaffected, upon the ground that the defendant's stock in the Company had not been paid, discharged, or extinguished by the transaction.

These cases appear to me to be conclusive of the case before me. The Act 27-28 Vic. ch. 23, sec. 27, expressly gives to this plaintiff, as an unsatisfied judgment creditor of the Company, the right to obtain execution against that portion of the assets of the Company, which consists of stock not paid up held by any shareholder.

To allow the defendant to defeat this right by setting up

his judgment, would be contrary to the scope and intent of the Act; would be subversive of the remedy given by the statute; would involve the application of the law of set-off to a case utterly opposed in principle to that law; and would give to a shareholder in an insolvent Company a wrongful preference, to the prejudice of a judgment creditor of the Company not a shareholder, contrary to every principle of law and equity, when the rights of outside creditors of a Company and of the shareholders therein come in conflict.

I have been referred by Mr. Kerr to a case of *Woodruff et al. v. The Corporation of the Town of Peterborough*, 22 U. C. R. 274, but that case has no application to the case before me; it proceeded wholly upon its own peculiar circumstances. Municipal corporations who are authorized to take stock in railway Companies can only do so by by-law, and in such by-laws they can and do make their subscriptions conditional upon certain provisions expressed in the by-laws, which must be fulfilled, and it was held that what took place in that case was a special application and payment in full of the stock taken by the corporation. In that case, therefore, there was held to be no unpaid stock of the corporation for the plaintiff's execution to attach upon.

Judgment for plaintiff (a).

(a) This and the two following cases were argued before GWYNNE, J., sitting alone, under the Administration of Justice Act, 1873.

HELEN FRASER, and HELEN CHRISTINA FRASER, JOHN FRASER, ANNIE FRASER, and JANE FRASER, Infants under the age of 21 years, by the said HELEN FRASER, their guardian and next friend, v. PHOENIX MUTUAL LIFE INSURANCE COMPANY.

Policy of Life Insurance—Right of Action—Declaration—Pleading.—Amendment.

The plaintiff H., and the other plaintiffs, infants, by H. as their guardian and next friend, declared on a policy of insurance, alleging that by it, in consideration of the premium paid to them by the plaintiffs, defendants assured the life of F., and by said policy promised to pay the sum insured to the plaintiffs, who at the time of making the policy were respectively the wife and children of F.; and that while the policy remained in force, the plaintiffs then being respectively the wife and children of F., the said F. died, &c.

Held, on demurrer, that the declaration sufficiently averred that the insurance was effected by F., under the 29 V. ch. 17, for the benefit of his wife and children.

But, *Held*, also, following *Campbell v. National Assurance Company of the U. S.*, 34 U. C. R. 35, that the plaintiffs could not sue jointly, but must bring separate actions for their respective shares.

The plaintiff H. was, however, allowed to amend by declaring anew for her own share separately, and the names of the other plaintiffs were struck out.

DEMURRER. Declaration: that by a policy of insurance bearing date the 7th October, 1872, made by the defendants, in consideration of the representations made to them in the application for the said policy, and of the sum of \$78.75 to them in hand duly paid to them in gold by the plaintiffs, and of an annual payment of a like sum in gold, to be paid on or before 17th October in every year during the continuance of the said policy, the defendants did assure the life of James Fraser, of Lefroy, in the county of Simcoe, in the amount of \$2,500 for the term of his natural life; and the defendants, in and by the said policy, did promise and agree to pay the said sum of \$2,500 in gold at their office in the city of Hartford, Connecticut, to the plaintiffs, who, at the time of the making of the said policy, were respectively the wife and children of the said James Fraser, or their executors, administrators or assigns, in ninety days after due notice and proof of the death of the said James Fraser, any indebtedness to the company on account

of the policy being first deducted therefrom. And (after setting out several conditions of the policy, not material to this demurrer), the declaration alleged that while the said policy remained in force, the plaintiffs then being respectively the wife and children of the said James Fraser, the said James Fraser died; and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs to maintain this action for the breach hereafter alleged, and nothing happened or was done to prevent them from maintaining the same: yet the plaintiffs have not been paid the said sum of \$2,500, and the same is wholly due and unpaid.

The defendants demurred to the declaration on the grounds: 1. That the declaration states the policy to have been made by the plaintiffs on the life of James Fraser, and does not allege what interest the plaintiffs had in the life of James Fraser, or that they had any interest in his life.

2. That it alleges that James Fraser, the person whose life was insured under the said policy, was the husband of Helen Fraser, and the father of the plaintiffs, Helen Christina Fraser, John Fraser, Annie Fraser, and Jane Fraser; but does not shew that such assurance was effected with the consent of the said James Fraser.

3. That the plaintiffs should have sued severally, not jointly, the action, if any, being a several one.

Joinder.

February 6, 1875. *W. H. Lockhart Gordon* for the defendants. The first and second objections are well taken: 29 Vic., ch. 17, secs. 1, 3, 4; 35 Vic. ch. 16, O. *Campbell v. National Assurance Co. of the United States of America*, 34 U. C. R. 35, is a direct authority that the liability is several, and it cannot be both joint and several; *Keightley v. Watson*, 3 Ex. 716, 721.

M. C. Cameron, Q. C., with him *Snelling*, contra. If the case of *Campbell v. National Assurance Co. of the United States of America*, 34 U. C. R. 35, is held to govern this case, the plaintiffs should be allowed to amend: Admini-

stration of Justice Act, 1873, sec. 8. The declaration does sufficiently aver that the assurance was made with the assent of James Fraser, and the interest of the plaintiffs in James Fraser's life. They referred to *Sorsbie v. Park*, 12 M. & W. 146.

March 4, 1875. GWYNNE, J. (*a*). The defendants must fail on the first and second objections taken to the declaration in this case, which, as a question of pleading, does, in my opinion, sufficiently aver, as against a demurrer, that the insurance was effected by James Fraser, under the provisions of 29 Vic., ch. 17, for the benefit of his wife and children.

But the defendants have objected that the plaintiffs cannot jointly maintain this action, but that a separate suit has to be brought against the defendants to recover the share of each plaintiff. What advantage the defendants propose to themselves from this objection it is difficult to perceive, inasmuch as it appears by the declaration that the children are minors, and that the plaintiff, their mother, has clothed herself with the character of guardian, so as to be the proper person to give to the defendants an effectual discharge for the moneys payable in respect of the infants' interest when paid.

However, the defendants have made the objection, and have referred me to *Campbell v. The National Assurance Company, of the United States of America*, 34 U. C. R. 35, in support of their contention.

I feel bound by that decision, which has certainly held that the liability of the insurance company is to each severally under a covenant contained in a policy similar to this; and as I do not think that the same covenant can, at the suit of the covenantees, be held to be both joint and several at the same time, so as to enable them to sue jointly or severally at their pleasure, I must decide this point in favor of the defendants, upon the authority of *Campbell v. The National Assurance Company, of the United States of America*, 34 U. C. R. 35.

(*a*) See note *a*, *ante* p. 421.

I give, however, leave to the plaintiff Helen Fraser, to amend the declaration by declaring for her own share separately, and for this purpose, under the powers of amendment vested in me by the Administration of Justice Act, the rule to be made herein will contain an order for the striking out of the names of the other plaintiffs other than the plaintiff Helen Fraser from the record as parties, and giving to the plaintiff Helen Fraser leave to declare anew for her own share separately, upon payment of costs.

Judgment for defendants on demurrer.

PORT DOVER AND LAKE HURON RAILWAY COMPANY V. GREY.

Port Dover & L. H. R. W. Co.—Action for calls—35 V. c. 53, 37 V. c. 57, O.

Declaration by the Port Dover and Lake Huron R. W. Co., against defendant as a shareholder, alleging that defendant holds four shares, and has paid ten per cent. thereon, and is indebted to the company in \$80, in respect of two several calls of \$10 each on each of said shares. Plea 2. That after the passing of the Act incorporating the company, 35 V. c. 53, O., and before the 37 V. c. 57, O., amending it, defendant subscribed for said shares, but did not, within five days next thereafter, pay ten per cent. thereon, whereby the subscription became void.

The 35 V. c. 53, s. 7, enacts that no subscription of stock shall be valid, unless ten per cent. shall have been paid thereon within five days after subscription; and by 37 V. c. 57, s. 1, all subscriptions of stock shall be valid on which ten per cent. shall have been actually and *bona fide* paid. *Held*, plea bad, for the payment after the five days was sufficient.

Third plea, that the Act of Incorporation provides that \$25,000 of stock shall be subscribed, and fifty per cent. be paid thereon, and the railway be *bona fide* commenced within two years, otherwise the charter should be forfeited and be void; and that this requirement was not complied with. *Held*, bad, on the authority of *City of Toronto and Lake Huron R. W. Co. v. Crookshank*, 4 U. C. R. 309.

The fourth, fifth, and sixth pleas set up that notice of the calls was not duly given and published: that the call exceeded ten per cent. on the subscribed capital, contrary to the Acts; and as to the second call, that it was made payable at a less interval than two months from the previous call. *Held*, good, under 35 Vic. ch. 53, secs. 13, 14, and C. S. C. ch. 66, sec. 48.

Seventh plea, in substance, that defendant subscribed for the shares on the express condition that \$100,000 should be subscribed applicable wholly to the construction of the road from Port Dover to Woodstock before any calls should be made in respect of his shares: that he never waived this condition, and that said sum had not been so subscribed. The company was incorporated to build a road from Port Dover to

Woodstock, with power to extend the same to Stratford. *Held*, plea good, for that it was competent for the company to receive subscriptions of stock to be applied to the main line and the extension separately, provided the condition was expressed in the subscription, and was not a secret qualification.

Eighth plea, that by plaintiffs' charter, the capital stock was declared to \$250,000: that defendant never subscribed except on the terms expressed in the said charter, that the full amount of said stock should be subscribed for before the road should be commenced: that not one-third of such stock was subscribed for: that the ten per cent. actually subscribed was sufficient for the expenses in procuring the Act, and making the surveys and estimates for the works: and that defendant subscribed before the general meeting required by sec. 8 of the Act, on the day of which meeting \$100,000 was subscribed, &c. *Held*, no defence.

The ninth plea, on equitable grounds, set out, in substance, that the road and extension would cost \$900,000: that the assets which the company had or could acquire would not exceed half that sum: that there was no possibility of making the road therewith, as the directors and plaintiffs well knew, but that they were proceeding to construct part, and to expend all said assets, in bad faith, for improper purposes, and with the view of personal gain to the directors and others in collusion with them, &c. *Held*, no defence to this action: that the charges were too loose and indefinite; and that if sustainable they would form proper ground for a bill in equity only.

DEMURRER. Declaration: (After reciting that a plaint had been entered in the 1st Division Court of the County of Oxford, at the suit of the plaintiffs against the defendant, and that the said plaint had been removed into this Court by a writ of *Certiorari*). For that the defendant is the holder of four shares in the capital stock of the said company, each of said shares being of the amount of \$100, and has paid ten per centum on the said four shares to the said company, and now is as such shareholder indebted to the said company in the sum of \$80 in respect of two several calls of \$10 each upon each of the said four shares, whereby an action has accrued to the said company by virtue of the Act incorporating the said company, being an Act of the Province of Ontario, passed in the thirty-fifth year of the reign of Her Majesty Queen Victoria, chapter fifty-three, and entitled an Act to incorporate the Port Dover and Lake Huron Railway Company, and the Acts amending the said Act of incorporation, to demand and have of and from the said William Grey the sum of \$80 and interest thereon; yet the said William Grey has not paid the same.

Pleas : 1. Never indebted.

2. That after the passing of the said Act incorporating the said company, and before an Act of the Parliament of the Province of Ontario, made and passed in a session thereof held in the thirty-seventh year of Her Majesty Queen Victoria, intituled "An Act to amend the several Acts of the Port Dover and Lake Huron Railway, and to confirm certain by-laws in aid thereof," had come into force and effect, the defendant subscribed to the said four shares in the capital stock of the said company, but did not within five days next thereafter pay ten per centum thereon into the chartered Bank of this Province designated by the directors, nor otherwise, by means whereof the said subscription of stock became and was and is illegal and void.

3. That the said stock of the defendant was so subscribed for by the defendant within two years from the passing of the said Act of incorporation of the plaintiffs; and in and by the said Act it is provided that unless \$25,000 at least of the said capital stock thereby required to be subscribed should be subscribed, and fifty per centum thereon should be paid, and the said line of railway thereby required to be constructed be *bonâ fide*, commenced within two years from the passing of the said Act, then and thenceforth the said Act and the privileges thereby conferred should become forfeited, and the rights and privileges conferred thereby should cease, be void and of no effect; and that fifty per centum on \$25,000 of the said stock was not paid to the company within the said period of two years; nor did the said company make calls to such amount on the said stock payable within the said period of two years,—by means whereof the said subscription of the said defendant to the said stock became void, and the rights of the plaintiffs to demand the said calls from the defendant became extinguished before the commencement of this suit.

4. That the said stock of the defendant was subscribed for by the defendant under the Act of incorporation of the plaintiffs in the declaration mentioned, and before the

calling of the general meeting in the eighth section of the said Act mentioned, and not otherwise; and notice of such calls was not given, at least thirty days previously to the same being payable, in the *Ontario Gazette*, and in one or more newspapers published in each of the counties of Perth, Oxford, and Norfolk, the same being the counties through which the railway of the plaintiffs runs, though there were one or more newspapers in each of the said counties in which such notices could have been published as aforesaid.

5. That the defendant subscribed for the said four shares in the said capital stock before the general meeting of the subscribers to said stock, required by the eighth section of the said Act to be holden, was holden, and within two years next after the passing of the said Act; and that on the sixth day of April, 1874, the directors of the said company made a call on the said stock of the defendant of sixty per centum on his said subscribed capital, payable in the respective sums of ten dollars each on the fourteenth days of May, July, September, and November, 1874, and the fourteenth day of January, 1875, and did thereby, contrary to the Acts regulating the said company, make a call at one time upon the said capital stock exceeding ten per centum on the said subscribed capital, which are the calls in the declaration mentioned.

6. As to twenty dollars, parcel of the moneys in the declaration mentioned, and being the call payable on the fourteenth day of July, 1874, as hereinafter mentioned, the defendant says that he subscribed for the said four shares in the said capital stock before the general meeting of the subscribers to such stock, required by the eighth section of the said Act to be holden, was held, and within two years next after the passing of the said Act; and that on the sixth day of April, 1874, the directors of the said company made two calls on the said stock of the defendant of ten dollars each, payable on the fourteenth days of May and July last respectively, which are the calls in the declaration mentioned, and did thereby

make the said call so payable on the fourteenth day of July aforesaid, payable at a less interval than two months from the said previous call of the fourteenth day of May aforesaid, whereby the last named call became and was and is void.

7. That by the Act of incorporation of the plaintiffs in the declaration mentioned, the plaintiffs were empowered to construct a railway from some point at or near the town of Port Dover to the town of Woodstock, and with power to extend the same to the town of Stratford; and as soon as shares to the amount of \$100,000 of the capital stock of the said company should have been subscribed and ten per centum paid thereon, the provisional directors named in the said Act should call a general meeting of such stockholders, and to elect a permanent Board as named in said Act: that the said provisional directors did procure stock in the said company, to be subscribed for under the said Act to the amount of \$100,000, prior to the seventeenth day of December, 1872; but a large portion thereof, to wit the sum of \$26,400 was subscribed on the terms and conditions in writing, that the amount of the last named stock should be expended solely in the construction of the said railway between Stratford and Woodstock. And that neither prior to the said seventeenth day of December, or on or since that day and prior to the commencement of this suit, have the said company procured subscribers to or holders of stock in the said company applicable to the construction of said railway from Port Dover to Woodstock, to the amount of the said sum of \$100,000, nor to any greater amount than the sum of \$73,600: that by virtue of the said Act the defendant became the subscriber of the said four shares, being a portion of the said sum of \$73,600, on the terms and conditions that the said sum of \$100,000 of the said stock should be first subscribed, applicable to the construction of the said railway from Port Dover to Woodstock before any calls should be made in respect of the said shares so subscribed by the defendant, and before he should be liable to pay the said

stock, or any part thereof; and the defendant never, at any time after his said subscription for the said shares, agreed or consented that the said company should commence or carry on business with the said number of shares, or with any less number of shares or stock than the said \$100,000 so to be subscribed as aforesaid; and that he never at any time derived or received any profit, benefit or advantage whatsoever from the said company, or in respect of his having so subscribed for and agreed to hold such shares as aforesaid.

8. That in and by the said Act of incorporation of the said company in the declaration mentioned, the capital stock of the said company was declared to be \$250,000 as in said Act is mentioned: that the defendant never at any time subscribed for or agreed to become the holder of any shares or share in the said company other than on the terms, as expressed in the said Act, that the full amount of the said capital stock should be subscribed for before the making, equipment, and completion of the said railway should be commenced; and that he never was and is not now a holder of any such share or shares except under and by virtue of the said terms: that the said intended capital of \$250,000 never was or could be raised, subscribed for or taken, but only a small part thereof not amounting to one-third part thereof: that the ten per centum on the stock actually subscribed for was sufficient for the payment and discharge of all fees, expenses, and disbursements for procuring the passing of the said Act, and for making the surveys, plans, and estimates connected with the works thereby authorized: that the defendant subscribed for the said four shares before the seventeenth day of December, 1872, and before the general meeting, in the eighth section of the said Act required to be held, was held, on which last named day only \$100,000 of such stock was subscribed, of which the said stock of the defendant formed a part; and that he never at any time derived any profit, benefit, or advantage whatsoever from the said company, or in respect of his having so subscribed for and agreed to hold such shares as aforesaid.

9. On equitable grounds, that by the Act of incorporation

of the said company the plaintiffs were empowered to construct a railway from at or near Port Dover to the town of Woodstock, and to extend the same to the town of Stratford; that the cost of making, equipping, and completion of the said railway from Port Dover to Woodstock aforesaid will amount to the sum of \$600,000 or thereabouts, and of extending the said road to Stratford the sum of \$300,000 or thereabouts: that the assets the said company have acquired for the construction of the first named piece of the said railway amount to the sum of \$300,000 and no more, and for the construction of the second named piece of the said railway the sum of \$150,000 and no more; that all the assets the said company have now acquired or can hereafter acquire for the making, and construction, and equipment of the said railway from Port Dover to Woodstock, is the said sum of \$300,000 and no more; and from Woodstock to Stratford is the said sum of \$150,000 and no more; and do not in all exceed one-half of the moneys necessary for the construction of the said railway; and there is not a possibility of constructing the said road by means of any assets or funds the plaintiffs have acquired or can possibly acquire from any sources now available or that can become available to the said company under any powers it at present possesses; of all which the plaintiffs and the board of directors of the said company have full notice, belief and knowledge. That the said company are now proceeding in the part construction of the said road, and intend to proceed with the part construction thereof until all the said assets are expended fraudulently and in bad faith, and for sinister and improper motives, and with the view and design of personal and improper gain and advantage to the individual members of the board and of others acting in fraudulent collusion with them, to arise from the expenditure of the said moneys, and not otherwise. That the moneys already in the possession of the said company are sufficient to pay all the fees, expenses, and disbursements for procuring the passage of the said Act, and of the cost of so much of the said

railway as has already been proceeded with; and that the present calls are now made and sought to be recovered solely for the purpose of expending the same for the unlawful, fraudulent, and improper purposes in this plea mentioned.

The plaintiffs joined issue on the pleas, and demurred to the second, third, fourth, fifth, sixth, seventh, eighth, and ninth pleas, on the grounds.

As to the second plea: 1. That the fact, if true, that the defendant did not pay the ten per cent. therein mentioned, within the five days therein mentioned, is no bar to the plaintiffs suing for the calls sued for; that defendant cannot take advantage of his own default. 2. That it does not appear, nor is it alleged in said plea, that defendant notified the plaintiffs that he would avoid his subscription of stock by reason of the ten per cent. not being paid within the five days mentioned. 3. That the plea is no bar to the action for the two calls mentioned. 4. That by the 37 Vic. ch. 57, O., the subscription is made valid, although ten per cent. thereof is not paid within five days.

As to the third plea: 1. That it does not appear, nor is it alleged, that defendant notified the plaintiffs, or did any act to avoid his subscription to the said stock for which he subscribed. 2. That sec. 25 of 35 Vic., ch. 23, O., is in effect repealed by 37 Vic., ch. 57, O.

As to the fourth plea: that the provisions in respect to calls in 35 Vic., ch. 53, sec. 14, and other sections affecting the question as to matter pleaded to, are only directory, and do not avoid the call or forfeit the stock; and the plea does not state that the defendant did not receive due and sufficient notice of the call.

As to the fifth plea: that the statute referred to, in its intent and effect, does not prohibit the call being made as in the manner referred to in the plea; and the effect of the call was only a call payable at several days and times; and that said statute is only directory.

As to the sixth plea: 1. that this plea seems to be founded on the 48th section of "The Railway Act," Consol. Stat. C.,

ch. 66; and in this respect the Act is only directory. 2. That the plea shews that the necessary interval did intervene to enable the plaintiffs to sue for the calls.

As to the seventh plea: 1. that the matters therein contained do not in law prevent the plaintiffs recovering for calls. 2. That the plaintiffs have the power to do the acts complained of in the said plea, and that the plea shews that the statute respecting the subscription of \$100,000, and the call for ten per cent., has been complied with, and that the Act is only directory.

As to the eighth plea: that the matters therein contained do not afford any defence to the plaintiffs' action for calls; and the calls could be made before the railway was completed; and that the Act in the plea referred to in this respect is only directory.

As to the ninth plea: that the matters therein pleaded form no defence in law or equity against the plaintiffs claim for calls.

Joinder.

February 11, 1875. *Harrison*, Q.C., for the defendants, as to the second plea, referred to 35 Vic., ch. 53, secs. 7, 11; 37 Vic., ch. 57, sec. 1; *President. &c., of Highland Turnpike v. McKay*, 11 Johns. 98; *President, &c., of Union Turnpike v. Jenkins*, 1 Cains 381; *Stratford & Moreton R. W. Co. v. Stratton*, 2 B. & Ad. 518; *Waugh v. Middleton*, 8 Ex. 352; *Re Proper and the Corporation of the Township of Oakland*, 34 U. C. R. 266. As to the third plea, the expression, "rights and privileges," includes the right to sue. As to the fourth plea, see 35 Vic., ch. 53, secs. 13, 14. As to the fifth plea, *Toronto Gas Co. v. Russell*, 6 U. C. R. 567; *London Gas Co. v. Campbell*, 14 U. C. R. 143. As to the sixth plea, 35 Vic., ch. 53, sec. 4; Consol. Stat. C. ch. 66, sec. 48; *Freeman v. Read*, 4 B. & S. 174; *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Howbeach Coal Co., Limited, v. Teague*, 5 H. & N. 151; *North Stafford Steel, Iron & Coal Co. (Burslem), Limited, v. Ward*, L. R. 3 Ex. 172; *Peirce v. Jersey Water Works Co.*, L. R. 5 Ex.

209. As to the ninth plea: *Elder v. New Zealand Land Improvement Co., Limited*, 30 L. T. N. S. 285.

D. B. Read, Q.C., contra, cited, as to the second plea, *City of Toronto & Lake Huron R. W. Co. v. Crookshank*, 4 U. C. R. 309. As to the fourth plea, *Hodges on Railways*, 5th ed., Ap. 28; *Eastern Union R. W. Co. v. Symonds*, 5 Ex. 237; *Ambergate, Nottingham & Boston & Eastern Junction R. W. Co. v. Mitchell*, 4 Ex. 540; *Moore v. McLaren*, 11 C. P. 534. As to the seventh and eighth pleas, *Moore v. Murphy et al.*, 11 C. P. 444; *Lake Superior Navigation Co. v. Morrison*, 21 C. P. 217; *Port Whitby & Port Perry R. W. Co. v. Jones*, 31 U. C. R. 170; *London & Brighton R. W. Co. v. Wilson*, 6 Bing. N. C. 135; *Ornamental Pyrographic Woodwork Co., Limited, v. Brown*, 2 H. & C. 63; *Cohen v. Wilkinson*, 12 Beav. 125; *Graham v. Birkenhead, Lancashire, & Cheshire Junction R. W. Co. et al.*, 2 McN. & G. 166; *Re Blakely Ordinance Co., Needham's Case*, L. R. 4 Eq. 135.

March 4, 1875. GWYNNE, J. (a)—The second plea is, in my opinion, bad. The question turns upon the construction of 35 Vic., ch. 53, sec. 7, O., and 37 Vic., ch. 57, sec. 1, O.

By the former it is enacted that "*No subscription of stock in the capital of the said company shall be legal or valid, unless ten per centum shall have been actually and bonâ fide paid thereon within five days after subscription, into one or more of the chartered banks of this Province, to be designated by the said directors.*"

The object of this section, I have little doubt, was to withhold from subscribers for stock the privilege of voting as stockholders unless the ten per centum should be paid as here directed. See *Wolverhampton New Water-works Co. v. Hawkesford*, 6 C. B. N. S. 336.

But in such case it would be quite competent for a person who had omitted to pay the ten per centum within the five days to become entitled to the privileges of a share-

(a) See note a, ante p. 421.

holder, and also to be subject to the liabilities as such, by renewing his subscription at the time of paying his ten per cent., without, as I think, signing his name again.

But all difficulty, if any could arise from the terms of this section, is removed by the first section of 37 Vic., ch. 57, which enacts that, "All subscriptions of stock in the capital of the said company shall be legal or valid, upon which ten per centum shall have been actually and *bonâ fide* paid thereon into one or more of the chartered Banks of this Province."

The grammatical construction and the good sense of the thing concur, in my opinion, in applying this to make good if necessary any stock previously subscribed upon which the ten per centum had been paid, but after the expiration of the five days from subscription. Indeed the payment of the ten per centum after the expiration of the five days is, in my opinion, itself a sufficient renewal of the subscription; so that in all cases where the ten per centum is paid, the express terms of the 35 Vic., ch. 53, sec. 7, may be said to be complied with.

The declaration, however, here alleges that the defendant has subscribed for stock, and has paid his ten per centum thereon, and is a shareholder in the company for the shares upon which such ten per centum has been paid. The plea, not denying these allegations, sets up as a defence that the ten per centum was not paid within the five days named in 35 Vic., whereby, as he contends, his subscription became illegal and void. This is a false conclusion, for the plea, admitting the payment of the ten per cent. upon shares subscribed for by him, sufficiently admits that the defendant is a shareholder, in which case he is liable to calls.

The case of *The City of Toronto and Lake Huron R. W. Co. v. Crookshank*, 4 U. C. R. 309, is an authority that the third plea is bad.

By the 35 Vic., ch. 53, sec. 14, it is enacted that "No call to be made at any time upon the said capital stock shall exceed ten per centum on the subscribed capital; and notice shall be given of all such calls in manner provided for meetings in section 13 of this Act."

The provision as to meetings in this section 13 is, that "public notice thereof shall be given at least thirty days previously in the *Ontario Gazette*, and in one or more newspapers published in the counties through which the railway runs."

The fourth section of the Act incorporates with the special Act the several clauses of the Railway Act of the Consolidated Statutes of Canada, and among those the clause with respect to "Calls."

By this clause of the Railway Act, namely, sec. 48, it is provided that the directors may make calls in respect of the capital subscribed, and it is enacted that, "thirty days notice at the least shall be given of each call, and no call shall exceed the prescribed amount determined in the special Act, *or be made at a less interval than two months from the previous call.*"

In view of these provisions in the statute, *Toronto Gas Co. v. Russell*, 6 U. C. R. 567; *Buffalo, Brantford & Goderich R. W. Co. v. Parke*, 12 U. C. R. 607; *Moore et al. v. McLaren* 11 C. P. 534; and *The Stratford and Moreton R. W. Co. v. Stratton*, 2 B. & Ad. 518, are authorities in support of the sufficiency of the fourth, fifth and sixth pleas.

The gist of the seventh plea I take to be, that the defendant therein alleges that he subscribed for the shares in the company, which were subscribed for by him, upon the express terms and conditions that the sum of \$100,000 of stock should be subscribed, applicable wholly to the construction of the road authorized to be constructed from Port Dover to Woodstock *before* any calls should be made in respect of the said shares so subscribed for by the defendant, and that he has never consented to any waiver of such conditions; and that the said sum of \$100,000 has never yet been subscribed for the purposes of said road from Port Dover to Woodstock.

Without these averments the plea would be clearly bad: *Moore et al. v. Murphy*, 11 C. P. 444; *Moore et al. v. Gurney et al.*, 21 U. C. R. 127; but it is contended that the plea is bad, notwithstanding these averments, upon the

authority of *Port Whitby & Port Perry R. W. Co. v. Jones*, 31 U. C. R. 170.

But that case, as it appears to me, does not govern the present. It was held there that a stockholder could not insist that the board of directors who made the call were not properly organized under the Act, or competent to act, upon an allegation that a large portion of the stock, which was necessary to be subscribed before the directors should be elected, and upon which ten per centum was paid, was taken under a secret and collusive agreement with the provisional directors of the company, whereby it was agreed that the party subscribing for such stock should not be subject to calls, or to make any further payments in respect of such stock; and that any payment which he might colourably make in respect of such subscription should be restored to him by and through the means of a contract for building the line of railway which the said provisional directors agreed to give him upon such terms as would ensure him a large profit, and at a rate far exceeding that for which other persons could have been procured to build the said line of railway.

The Court there held that the agreement upon which it was alleged that the stock objected to was subscribed was void, and that the subscription was binding upon the subscriber, and so that the company was properly organized, and that the directors were competent to make the call.

In this case before me the constitution and organization of the company was not attacked; and if the plea merely set up a secret agreement made between him and the provisional directors, that although his stock appeared to be subscribed for unconditionally in the books of the company, still that he, the defendant, should be exempted from the liability to calls imposed upon him by his subscription until a certain event should arise, I should hold such a plea to be plainly bad, as disclosing a state of things constituting a fraud upon all persons dealing with the company, and in contravention of the Act of Parliament.

But here the Act incorporates the company for two purposes: the one may be said to be the principal, the other accessory; the principal purpose is to construct a railway from Lake Erie, near Port Dover, to the town of Woodstock, and the accessory is involved in these words, "with power to extend the same to the town of Stratford."

The company might, if they pleased, have never made the extension at all, or they might go on with both the main line and the extension *pari passu*; but it was quite competent for the company to receive subscriptions for stock from persons interested in the construction of the main line, to be applied to that purpose alone, and from persons interested in the construction of the extension, to be applied to that purpose alone. This, as I understand the plea, is what it alleges was done.

The defendant alleges that the stock subscribed for by him was for the main line from Port Dover to Woodstock. As it was, in my judgment, quite competent for the company to have particular stock subscribed for, only applicable to the main line, and other stock only applicable to the extension, so, as it seems to me, was it quite competent for the parties respectively subscribing for these stocks to contract with the provisional directors, that beyond the ten per centum payable by the Act upon subscription, no other money whatever should be called for, nor any calls be made, until a particular sum should be subscribed for the main line, or for the extension line, as the case might be.

The plea alleges that defendant's subscription was made upon the express terms and conditions that no call should be made on his stock, which was specially appropriated to and subscribed for the main line, until \$100,000 should be subscribed for the main line alone, that is, for the road from Port Dover to Woodstock.

If this condition should appear in the book where the defendant's subscription appears, no person could complain that he was induced to contract with the company upon the faith of the defendant's subscription being unconditional. Nor do I see that such an arrangement would be

in contravention of the Act of Parliament incorporating the company.

Reading this plea as an averment that the defendant's stock was so taken upon the express condition alleged, that no call should be made upon the stock until \$100,000 should be subscribed for the purpose of the main line exclusive of the extension, and that such sum had not been subscribed when the call was made, I am of opinion that the plea is good in bar of an action for a call made in contravention of that subscription; but to establish such a plea, it will be necessary to shew that the condition is expressed where the stock is expressed to be subscribed, and that it is not a secret agreement professing to qualify a subscription apparently unconditional.

The eighth plea is clearly bad, upon the authority of the cases above cited of *Moore et al. v. Murphy*, 11 C. P. 444, and *Moore et al. v. Gurney et al.*, 21 U. C. R. 127, and upon principle; for notwithstanding that the whole amount of the capital is not subscribed, the Act authorizes the provisional directors to do everything which elected directors could do, and so, therefore, they might make calls; and if they could, the Act authorizes such to be made even before the full \$100,000 should be subscribed, upon the subscription of which only were directors to be elected under the Act; and no doubt there may have been expenses incurred which should have to be paid, even though there be now no prospect whatever of the road being ever constructed.

The ninth plea contains certainly very grave imputations, but at the same time very loose and indefinite charges, against the directors of this company: so loose and indefinite indeed, that I do not think any issue can be taken upon them. The plea is pleaded by way of equitable defence; but I apprehend that neither the principles of equity nor common law countenance such loose accusations in pleading. If specific matter to justify the conclusions arrived at by the defendant as to the motives and intentions of the directors of the company in prosecuting this action, can be alleged, his proper course would seem to be to bring

the matter under the consideration of the company at a general meeting; not as a defence upon equitable grounds to an action for calls.

I do not think that the statutes for the amendment of the law and the better administration of justice authorize the conversion of an action against a shareholder in a company, for calls upon his shares, into a bill by the defendant for the dissolution of the company and the winding up of its affairs. For all that appears, every individual shareholder in the company, except the defendant, may be approving the action of the directors in prosecuting for the recovery of all overdue calls. If he, defendant, thinks he can particularize the charges which he has but loosely insinuated in this plea, he may do so in the Court of Chancery, where he can frame a bill, if so advised, having for its scope something more than the mere resistance of the payment of overdue calls.

Judgment on demurrer for defendant to the fourth, fifth, sixth, and seventh pleas, and for plaintiffs on the second, third, eighth, and ninth pleas.

During Hilary Term, on the 13th February, the following rules were promulgated:—

In the Queen's Bench.

GENERAL RULES FOR THE TRIAL OF CONTROVERTED ELECTIONS OF MEMBERS OF THE HOUSE OF COMMONS,

Made under and by virtue of the Act of the Dominion of Canada passed 26th May, A.D. 1874, being the "DOMINION CONTROVERTED ELECTIONS ACT, 1874."

I.

On the presentation of an election petition, there shall be left with the clerk of the Court, a copy thereof, to be sent to the returning officer under section 8 of the Act.

II.

An election petition shall contain the following statements:—

1. It shall state the right of the petitioner to petition within section 7 of the Act.

2. It shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.

The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any petition not substantially in com-

pliance with this rule, unless otherwise ordered by the Court or Judge.

IV.

The petition shall conclude with a prayer, as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced (as the case may be,) and shall be signed by all the petitioners.

V.

The following form, or one to the like effect, shall be sufficient :—

IN THE QUEEN'S BENCH.

"The Dominion Controverted Elections Act, 1874." Election of a Member for the House of Commons for (*state the place*) holden on the day of A.D.

Dominion of Canada, } The Petition of A of
Province of Ontario. } or of A of and of B of ,
To wit: } (*as the case may be,*) whose names
 are subscribed.

1. Your petitioner A is a person (*or if more than one, say your Petitioners are persons*) who was (*or were*) duly qualified to vote at the above election, *or* claims to have had a right to be returned or elected at the above election, (*or was a candidate at the above election.*)

2. And your petitioners state that the election was holden on the day of A.D. when AB, CD, and EF were candidates, and the returning officer has returned AB, as being duly elected.

3. And your petitioners say that (*here state the facts and grounds on which the petitioners rely.*)

Wherefore your petitioners pray that it may be determined that the said AB was not duly elected or returned, and that the election was void, (*or that the said EF was duly elected and ought to have been returned,*) *or, as the case may be.*

Signed,

A.
B.

VI.

Evidence need not be stated in the petition, but the Court or a Judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same way as in ordinary proceedings in the Superior Courts of Common Law, and upon such terms as to costs and otherwise as may be ordered.

VII.

When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of and the party defending the election or return shall each six days before the day appointed for trial deliver to the clerk of the Court, and also at the address if any given by the petitioners and respondent, (*as the case may be,*) a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the clerk of the Court shall allow inspection and office copies of such lists to all parties concerned ; and no evidence shall be given against the validity of any vote nor upon any head of objection not specified in the list, except by leave of the Court or a Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs or otherwise, as may be ordered.

VIII.

When the respondent in a petition under the Act, complaining of an undue return, and claiming the seat for some person intends to give evidence to prove that the election of such person was undue, pursuant to the 66th section of the Act, such respondent shall six days before the day appointed for trial deliver to the clerk of the Court, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely ; and the clerk of the Court shall allow inspection and office copies of such list to all parties concerned ; and no evidence shall be given by a respondent

of any objection to the election not specified in the list, except by leave of a Judge of the Court, or, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered.

IX.

With the petition, petitioners shall leave at the office of the clerk of the Court a writing, signed by them or on their behalf, giving the name of some person entitled to practice as an attorney, or whom they authorize to act as their agent, or stating that they act for themselves (*as the case may be,*) and in either case giving an address within the City of Toronto, at which notices addressed to them may be left; and if no such writing be left or address given, then all notices and proceedings may be given and served by sticking up the same at the office of the clerk of the Court.

X.

Any person returned as a member may, at any time before or after presentation of a petition against his return, send or leave at the office of the clerk of the Court a writing signed by him or on his behalf, appointing a person entitled to practise as an attorney to act as his agent, in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the City of Toronto, at which notices may be left; and in default of such writing being left within a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the office of the clerk of the Court.

XI.

The clerk of the Court shall keep a book or books at his office, in which he shall enter all addresses and names of agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours, without payment of any fee.

XII.

The clerk of the Court shall, upon the presentation of the petition, forthwith send a copy of the petition to the returning officer, pursuant to section 8 of the Act, and shall therewith send the name of the petitioner's agent, if any, and of the address, if any, given as prescribed, and also the name of the respondent's agent, and the address, if any, given as prescribed, and the returning officer shall forthwith publish those particulars along with the petition. The cost of publication of this and any other matter required to be published by the returning officer, shall be paid by the petitioner, or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition shall be five days, exclusive of the day of presentation.

XIV.

Where the respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given, at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the respondent, unless a Judge, on an application made to him not later than five days after the petition is presented, on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service, and cause the matter to come to the knowledge of the respondent, in which case the said Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the affixing in a conspicuous place in the office of the clerk of the Court a notice of the

petition having been presented, stating the petitioner, the prayer, and the fact that money has been paid into Court as security under the Act, shall be deemed equivalent to personal service if so ordered by a Judge.

XVI.

All claims at law or in equity to money deposited, or to be deposited for payment of costs, charges, and expenses payable by the petitioners, pursuant to section 8 of the Act, shall be disposed of by the Court or a Judge.

XVII.

Money so deposited shall, if and when the same is no longer needed for securing payment of such costs, charges and expenses, be returned or otherwise disposed of as justice may require, by rule of the Court or order of a Judge.

XVIII.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for, as the Court or Judge may require.

XIX.

The rule or order may direct payment either to the party who deposited the same, or to any person entitled to receive the same.

XX.

Upon such rule or order being made the amount may be paid by the clerk of the Court.

XXI.

The clerk of the Court shall keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable, which book may be inspected without payment of any fee.

XXII.

The clerk of the Court shall make out the election list. In it he shall insert the names of the agents of the petitioners and respondent, and the addresses to which notices may be sent (if any). The list may be inspected at any time during office hours, and shall be put up for that purpose on a notice board appropriated to proceedings under the said Act, and headed, "The Dominion Controverted Elections Act, 1874."

XXIII.

The time and place of the trial of each election petition shall be fixed by the Court, and notice thereof shall be given in writing by the clerk of the Court, by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the petitioner, another to the address given by the respondent (if any), and a copy by the post to the sheriff, fifteen days before the day appointed for the trial: the sheriff shall forthwith publish the same in the electoral division.

XXIV.

The affixing of the notice of the trial at the office of the clerk of the Court shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXV.

The notice of trial may be in the following form:—

IN THE QUEEN'S BENCH.

"The Dominion Controverted Elections Act, 1874." Election petition of (name the Electoral Division). Take notice that the above petition (or petitions) will be tried at _____ on the _____ day of _____ and on such other subsequent days as may be needful.

Dated the _____ day of _____

By order,

(Signed) A. B.

C. C. & P. Q. B.

XXVI.

At any time after an election petition is filed, either party, by order of the Court or a Judge, may have production and inspection of all books, lists, commissions, ballots, certificates, statements, papers, documents, and returns whatsoever, relating to the election, returned to or in possession of the Clerk of the Crown in Chancery, at such place and in such manner, and upon such terms as the Court or Judge shall direct. And for the purpose of such production and inspection, and for the purposes of the trial of the election petition, the Clerk of the Crown in Chancery shall deliver or transmit as and when directed by rule of Court or Judge's order, the said books, lists, commissions, ballots, certificates, statements, documents, papers, and returns, in such manner and to such officer as by rule of Court or Judge's order shall be directed.

The said books, lists, commissions, ballots, certificates, statements, documents, papers, and returns, to be returned to the custody of the Clerk of the Crown in Chancery after the trial of the petition, or after the purpose has been served for which their delivery or transmission was required.

XXVII.

A Judge may from time to time, by order made upon the application of a party to the petition, or by notice in such form as the Judge may direct to be sent to the sheriff postpone the commencement of the trial to such day as he may name, and such notice when received shall be forthwith made public by the sheriff.

XXVIII.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day until the arrival of the Judge.

XXIX.

No formal adjournment of the Court for the trial of an election petition shall be necessary, but the trial is to be deemed adjourned and may be continued from day to day, until the enquiry is concluded; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be recommenced or concluded by any other of the Judges.

XXX.

The application to state a special case may be made a rule in the Court when sitting, or by a summons before a Judge upon hearing the parties.

XXXI.

All affidavits and papers in any election matter in Court, or in any Court for the trial of an election petition, may be entitled as follows:—

IN THE QUEEN'S BENCH.

THE DOMINION CONTROVERTED ELECTIONS
ACT, 1874.

Election of a Member for the House of Commons for
(*name the Electoral Division*).

Dominion of Canada. }
Province of Ontario. }
To wit: }

XXXII.

An officer shall be appointed for each Court for the trial of an election petition, who shall attend at the trial in like manner as the clerks of assize and of arraigns attend at the assizes. Such officer may be called the registrar of that Court. He by himself, or in case of need his sufficient deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XXXIII.

The reasonable costs of any witness shall be ascertained by the registrar of the Court, and the certificate allowing them shall be under his hand.

XXXIV.

The order of a Judge to compel the attendance of a person as a witness may be in the following terms :

Court for the trial of an election petition for (*complete the title of the Court*), the day of

To A. B. (*describe the person*). You are hereby required to attend before the above Court at (*place*) on the day of , at the hour of (*or forthwith, as the case may be*), to be examined as a witness in the matter of the said petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.,
Judge of the said Court.

XXXV.

In order to the commitment of any person for contempt, the warrant may be as follows :—

At a Court holden on at for the trial of an election petition for the (*here name the Electoral Division*), before the Honourable and one of the Judges pursuant to the “Dominion Controverted Elections Act 1874.”

Whereas A. B. has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof;—The said Court does therefore sentence the said A. B. for his said contempt to be imprisoned in the gaol for , and to pay to Our Lady the Queen a fine of \$, and to be further imprisoned in the said gaol until the said fine be paid. And the Court further orders that the sheriff of the said county (*or as the case may be*), and all constables and officers of the

peace of any county or place where the said A. B. may be found, shall take the said A. B. into custody, and convey him to the said gaol, and there deliver him into custody of the gaoler thereof to undergo his said sentence. And the Court further orders the said gaoler to receive A. B. into his custody, and that he shall be detained in the said gaol in pursuance of the said sentence.

Signed the day of A.D.
(To be signed by the Judge.)

XXXVI.

Such warrant may be made out and directed to the sheriff, or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and officers of the peace of the county or place where the person adjudged guilty of contempt may be found; and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed or any or either of them.

XXXVII.

All interlocutory questions and matters shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under "The Dominion Controverted Elections Act, 1874," as a Judge in Chambers in the ordinary proceedings of the Superior Courts.

XXXVIII.

Notice of an application for leave to withdraw a petition shall be in writing and signed by the petitioners or their agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient:—

IN THE QUEEN'S BENCH.

“THE DOMINION CONTROVERTED ELECTIONS
ACT, 1874.”

(Name the Electoral Division) Petition of (state petitioner) presented day of The petitioner

proposes to apply to withdraw his petition upon the following ground (here state the ground), and prays that a day may be appointed for hearing his application.

this day of
(Signed)

XXXIX.

The notice of application for leave to withdraw shall be left at the office of the clerk of the Court.

XL.

A copy of such notice of the intention of the petitioner to apply for leave to withdraw his petition shall be given by the petitioner to the respondent and to the returning officer, who shall make it public in the electoral division to which it relates; and shall be forthwith published by the petitioner in at least one newspaper published or circulating in the place, if any.

The following may be a form of such notice:—

IN THE QUEEN'S BENCH.

“THE DOMINION CONTROVERTED ELECTIONS
ACT, 1874.”

In the election petition for in which
is petitioner, and respondent.

Notice is hereby given that the above Petitioner has on the day of lodged at the office of the clerk of the Court notice of an application to withdraw the petition, of which notice the following is a copy (set it out). And take notice that by the rule made by the Judges of the said Court of Queen's Bench, any person who might have been a petitioner in respect of the said election may within five days after publication by the returning officer of this notice, give notice in writing of his intention on the hearing, to apply for leave to be substituted as a petitioner.

(Signed)

XLI.

Any person who might have been a petitioner in respect of the election to which the petition relates, may, within

five days after such notice is published by the returning officer, give notice in writing signed by him, or on his behalf, to the clerk of the Court, of his intention to apply at the hearing to be substituted for the petitioner; but the want of such notice shall not defeat such application, if in fact made at the hearing.

XLII.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the clerk as in manner hereinbefore provided; and notice of the time and place for the hearing, shall be given to such person or persons, if any, as shall have given notice to the clerk of the Court of an intention to apply to be substituted as petitioners, and otherwise in such manner and at such time as the Judge directs.

XLIII.

Notice of abatement of a petition by death of the petitioner or surviving petitioner, under section 56 of the said Act, shall be given by the party or person interested, in the same manner as notice of an application to withdraw a petition; and the time within which application may be made to the Court or Judge by motion or summons of a Judge to be substituted as a petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstances, the Court or Judge may allow.

XLIV.

If the respondent dies, or is summoned to Parliament as a member of the Senate, or if the House of Commons have resolved that his seat is vacant, any person entitled to be a petitioner, under the Act in respect of the election to which the petition relates, may give notice of the fact in the electoral division, by causing such notice to be published in at least one newspaper published or circulating

therein, if any, and by leaving a copy of such notice signed by him, or, on his behalf, with the returning officer, and a like copy with the clerk of the Court.

XLV.

The manner and time of the respondent giving notice to the Court that he does not intend to oppose the petition, shall be by leaving notice thereof in writing at the office of the clerk of the Court, signed by the respondent, six days before the appointed day for trial, exclusive of the day of leaving such notice,

XLVI.

Upon such notice being left at the office of the clerk of the Court, he forthwith shall send a copy thereof by the post to the petitioner or his agent, and to the sheriff, who shall cause the same to be published in the electoral division.

XLVII.

The time for applying to be admitted as a respondent, in either of the events mentioned in the 57th section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or a Judge may allow.

XLVIII.

Costs shall be taxed by the clerk of the Court, or, at his request, by any master of a Superior Court, upon the rule of Court, or Judge's order, by which the costs are payable, and costs when taxed may be recovered by execution issued upon the rule of Court, ordering them to be paid, or, if payable by order of a Judge, then, by execution upon such order, or in case there be money in Court available for the purpose, then to the extent of such money by order of the Court or a Judge. The office fees payable for inspection, office copies, enrolment and other proceedings under the Act and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of this Court.

XLIX.

An agent employed for the petitioner or the respondent shall forthwith leave written notice at the office of the clerk of the Court, of his appointment to act as such agent, and service of notices and proceedings upon such agent shall be sufficient for all purposes.

L.

At the time appointed for the trial of any election petition, the petitioner shall leave with the registrar, for the use of the Judge, at the trial, fairly written on one side of the paper only, a copy of the petition and of all the proceedings thereon, which shew the several matters to be tried, including the particulars of objection on either side, the correctness of which copy, in so far as the proceedings are filed with the clerk of the Court, shall be certified by the said clerk. The Judge may allow amendment of the said copy, or in default of such copy being delivered, the Judge may refuse to try the petition, or may allow a further time for delivery of the copy, or may adjourn the trial, in every case upon such terms, as to costs and otherwise, as the Judge shall see fit to impose.

LI.

After the trial of any election petition the Judge shall return to the clerk of the Court the evidence and proceedings before the said Judge, and his finding on the said petition.

LII.

No proceedings under "The Dominion Controverted Elections Act, 1874," shall be defeated by any formal objection.

LIII.

Any rule made or to be made in pursuance of the Act shall be published by a copy thereof being put up in the office of the clerk of the Court.

(Signed) WM. B. RICHARDS, C. J.
JOS. C. MORRISON, J.
ADAM WILSON, J.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

GEORGE MORRICE ROGERS, WARREN BURTON, COLIN J. SNIDER, GEORGE BURROWES GORDON, JOHN BRUCE, LOUIS W. P. COUTLEE, CHARLES GAMON, WILLIAM DARLEY POLLARD.

SITTINGS IN VACATION

AFTER HILARY TERM.

OSBORNE ET AL. V. PIERSON.

Promissory Note—Consideration—Pleading.

In an action on a note by payee against maker, a plea that there was never any value or consideration for the making the said note or paying the same, is bad on demurrer; it should state the circumstances under which the note was given, and deny that there was any other consideration than alleged.

DEMURRER. Declaration, on a promissory note dated 1st October, 1874, for \$1,000, made by defendant, payable to plaintiff, or order.

Third plea, that there never was any value or consideration for the making the said note or paying the same.

Demurrer, on the grounds :—1. The said plea fails to shew in what respect there was no consideration for making the said note, and to make the said plea an answer in law to the said first count it should state the circumstances which shew there was no consideration for the making or payment of the said note.

2. The said plea does not shew the particular facts from which the want of consideration appears.

Issue.

March 30, 1875. *Hoyles* for plaintiff. The plea is defective in not stating the circumstances from which the want of consideration arises, and it should deny the presence of any other consideration: *Byles* on Bills, 11th ed., 421, and the cases there cited.

A. H. Meyers, contra. The plea is a full answer to the declaration, and is therefore good; and it is no objection that a similar plea is also on the record. Before special demurrers were abolished, the plea would have been held bad, but now it is otherwise.

April 2, 1875. HAGARTY, C. J. C. P. This very unnecessary plea follows a plea shewing how, as defendant contends, there was no consideration, on which issue was joined. The plaintiff has (as I think unfortunately) been allowed to take issue and to demur to the plea before me. This double course should only be resorted to in the interest of substantial justice. Here nothing but the costs of this demurrer can possibly be at stake.

Unembarrassed by authority, I hardly see why or how such a plea should not be allowed as giving a full answer. The general objection urged to it is that it should shew the circumstances from which the conclusion of no value arises. This objection would, however, equally apply to many other pleas, such as payment, never indebted, &c., &c.

On the authorities, the plea is apparently bad. The last edition of *Byles*, 11th ed., p. 421, says: "A plea simply averring absence of consideration is improper. It should state affirmatively the circumstances, * * and distinctly deny that there was any consideration other than that alleged. But it is good after verdict."

I have seen no very recent case. The authorities there given are not later than 1852.

Boden v. Wright, 12 C. B. 445, cites several of the preceding cases, and the Court advised counsel to amend a plea setting out certain circumstances to shew there was no value "by distinctly denying that there was any consideration other than that alleged."

Easton v. Pratchett, 1 C. M. & R. 798, is referred to. Lord Abinger there says, at p. 806, in upholding a plea like this after verdict: "The new regulations do not justify the form of the plea. It was intended to make it incumbent upon a defendant to set forth the circumstances under which the bill is sought to be impeached": Affirmed in Error, 2 C. M. & R. 542.

In *Mills v. Oddy*, 2 C. M. & R. 104, Parke, B., says, p. 105: "The Judges, in framing the rules, never contemplated the adoption of a general plea of want of consideration. The intention was, that the facts under which the bill or note

was given should be specially stated as the ground of defence."

Stoughton v. Earl of Kilmorey, same vol. 72, is to the same effect. The plea was as here. Lord Abinger says, p. 74: "All the advantages to be derived from the new rules of pleading would be entirely lost, if this mode of pleading were to be allowed."

See also *Trinder v. Smedley*, 3 A. & E. 522. The law is laid down to the same effect in *B. & L. Prec.*, 3rd ed., 525.

The plea would not, I think, have been allowed in Chambers under the system that prevailed for some years. It is now allowed, and the parties unsuccessfully pleading this plea must suffer, if my judgment be correct.

Judgment for plaintiff on demurrer.

MACMATH V. CONFEDERATION LIFE ASSOCIATION.

Agreement to furnish security to defendants' satisfaction—Construction—Condition precedent.

The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition, that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general Board for the due performance of his duties: that he did not furnish such security; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the Board, and that the Board unreasonably, capriciously, and improperly refused to be satisfied therewith.

Held, replication bad; for the furnishing security satisfactory to the Board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting *bonâ fide* under an honest sense of dissatisfaction.

DEMURRER. Declaration: for that by an agreement entered into by and between the plaintiff and the defendants, it was agreed that the plaintiff should enter into and continue in the service and employ of the defendants, and that the defendants should receive and retain the plaintiff

in such service in the capacity of an agent to solicit applications for insurance policies, &c., for the period of five years from and after the 8th of October, 1873—unless or until such service should be determined by either the plaintiff or the defendants giving to the other of them three months' notice of his or their intention to determine said service—at a salary at the rate of \$50 per month, and in addition thereto a commission on premiums on all policies of insurance issued by the defendants through his, the plaintiff's, instrumentality, of twenty per cent. on the first annual premium, &c., &c., to be paid by the defendants to the plaintiff in that behalf, until the said service should be determined as hereinbefore mentioned. And all conditions were performed and all things happened, and all times elapsed necessary to entitle the plaintiff to be received and retained by the defendants in their said service in the capacity and on the terms aforesaid; yet the defendants did not nor would receive the plaintiff into their said service in the capacity and on the terms aforesaid, whereby the plaintiff lost the profits and emoluments which would have accrued to the plaintiff from being received into and retained in the said service of the defendants as aforesaid, and was also deprived of the opportunity of being retained and employed by any other person, and remained out of service and employment for a long time, and lost the benefit of divers expenses which the plaintiff necessarily incurred in and about entering into and preparing to perform the said agreement on the plaintiff's part.

Plea: that the agreement in the said counts mentioned was entered into with the plaintiff by the defendants, through their general manager duly authorized in that behalf, and was subject to a condition that the appointment of the plaintiff as agent, and otherwise, as in said count alleged, should not go into effect until the plaintiff should have furnished certain security, satisfactory to the general board of the defendants, for the sum of \$2,000, for the faithful performance and observance by the plaintiff of all the matter and things in said agreement provided, and by

him to be performed and observed; and the plaintiff, after the making of the said agreement, did not furnish security as aforesaid for the purposes aforesaid satisfactory to the said general board, and the said appointment never went into effect.

Replication: that in pursuance of said agreement and condition, and within a reasonable time, the plaintiff did furnish and supply the defendants with a good and sufficient bond for the said sum of \$2,000 conditioned as in said plea mentioned, and such as ought reasonably to have satisfied the said general board of the defendants, and the said general board unreasonably, capriciously and improperly refused to be satisfied with the said bond as furnished and supplied as aforesaid by the plaintiff.

Demurrer, on the ground, that the said replication confesses, but does not avoid the said plea.

Joinder.

April 2, 1875. *Beaty*, Q. C., for the demurrer. The replication stops short of *mala fides*, and only alleges that the defendants capriciously refused to be satisfied; it is therefore defective: *Stadhard v. Lee*, 3 B. & S. 364, 372; *Boulton v. Bethune*, 21 Grant 110. The replication is also a departure.

G. B. Gordon. There is no departure. The plaintiff has performed the condition so far as he was able. The satisfaction of the defendants was not a condition precedent. Where the agreement is, that the work shall be done to the satisfaction of a third party, then that is a condition precedent; but it is different where one agrees to do work to the satisfaction of another. *Stadhard v. Lee* and *Boulton v. Bethune*, cited for the plaintiff, are distinguishable. He referred to *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782; *Harrison v. Great Northern R. W. Co.*, 21 L. J. C. P. 89.

April 6, 1875. HAGARTY, C. J. C. P.—There is no doubt whatever that on these pleadings the furnishing of a security

satisfactory to the board was by agreement made a condition precedent to the appointment of the plaintiff going into effect.

The plaintiff wishes to have it read, "security that ought reasonably to satisfy the board," that is, security that, in the opinion of other reasonable men, would be satisfactory.

The defendants insist that they bargained for being satisfied themselves, whether other people might think them reasonable or unreasonable; and that their being satisfied themselves, so long as they acted in good faith, was a clear condition to their appointing or employing the plaintiff.

This certainly appears to be the true legal result.

In the latest case cited of *Stadhard v. Lee*, 3 B. & S. 364, the subject is fully discussed.

Cockburn, C. J., says, at p. 372: "Where, from the whole tenor of the agreement it appears that however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. * * * So long as the defendants were acting *bonâ fide* under an honest sense of dissatisfaction, although that dissatisfaction might be ill founded and unreasonable, they were entitled to insist on the condition." It was therefore held that a replication just like this, stopping short of alleged bad faith in defendants, was insufficient.

That was a much harder case than this, as it was taking advantage of a clause in a working agreement, that if the plaintiff was not carrying on the work as rapidly and satisfactorily as required by defendants or their agents, they might put on men to do the work, charging it to the plaintiff, &c., &c. The attempt was, as here, to shew that the work was proceeding as rapidly, &c., as defendants or their agent ought to have been reasonably satisfied with, and averring, as here, unreasonable, improper and capricious conduct.

The plaintiff relied on *Braunstein v. Accidental Death Insurance Company*, 1 B. & S. 782, 795, where defendants, having taken premiums of insurance against accidents, resisted payment on the ground that the defendants required the plaintiff to furnish certain information that they deemed necessary, which he did not do. The policy was declared to be subject to certain regulations and conditions endorsed : one of which was, that before payment of the sum insured proof satisfactory to the directors should be furnished of the death, accident, &c. The replication was as in the case before us. The Court held it sufficient, expressing a strong doubt of its being, as contended, a condition precedent, and that it was rather a clause directory as between the shareholders and directors. They held the plea bad and the replication good.

Crompton, J., says, at p. 797 : "The real question in all cases of this nature is, * * what was the intention of the parties ? Now, I cannot conceive that any company would put before a person desirous of effecting an insurance with them, a stipulation that, in order to establish the occurrence of an accident insured against, their own directors might require any evidence, however chimerical, capricious, and unjust the asking of it might be."

Blackburn, J., held the plea bad, and said, at p. 799 : "No doubt they might have stipulated that no money should be payable under a policy unless the directors obtained any evidence they chose to ask for, but it would require very distinct language, and much stronger than any used here, to shew that the parties so intended."

I think such cases as *Dallman v. King*, 4 Bing. N. C. 105, are easily distinguishable.

In the case before us, I think the parties have made the satisfaction of the board of directors clearly a condition precedent ; and that in a case like this, defendants are not to be lightly deprived of a right they reserved, I think very reasonably, to themselves, to accept or reject the security required.

It is just the kind of thing that they ought to be allowed to hold at their absolute pleasure.

If this replication tender a good issue, the trial of the security is transferred to a most inconvenient and eminently unsatisfactory process.

This condition lies on the threshold of the parties dealings. It is not a case involving the possible injustice of taking a man's money, or time or labour, and then claiming a right to pay or not to pay as caprice might suggest.

Judgment for defendants.

MUNRO V. THE COMMERCIAL BUILDING AND INVESTMENT SOCIETY.

Mortgage—Insolvent Act of 1869, sec. 50—Right to distrain for mortgage money.

One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of 1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, the defendants distrained therefor on these goods, which were still upon the mortgaged premises. *Held*, that the defendants' only remedy was by application under sec. 50 of the Insolvent Act, and that they had no right to distrain.

SPECIAL CASE, stated by leave of Galt, J., by order, dated 27th February, 1875, and by consent of parties.

The case was to the effect: that on the 17th day of May, 1873, one Thomas McMurray, to secure certain payments of money, mortgaged certain lands in Bracebridge to the Commercial Building and Investment Society, which mortgage was duly registered on the 17th day of May, 1873, and contained a covenant or proviso that if the mortgagor, his heirs, &c., should make default in payment of the moneys secured by the mortgage, "it shall and may be lawful for the said mortgagees or their successors to distrain therefor, upon the said lands, tenements, heredita-

ments and premises, or any part thereof, and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises, so much of any such instalments as shall from time to time be or remain in arrear and unpaid, together with all costs, charges, and expenses attending such levy or distress, as in like cases of distress for rent."

On the 7th July, 1874, the said McMurray assigned under the Insolvent Act of 1869 to one S. C. Wood, an official assignee, who took immediate possession thereof, and such proceedings were thereafter had in the matter of the said insolvency that the plaintiff became and is the duly appointed assignee of the estate and effects of said insolvent.

That the said assignee as such under and by virtue of said assignment entered on the lands and premises described in said mortgage, and took possession of certain goods and chattels thereon belonging to the mortgagor, and which passed to the assignee under said assignment, which said goods and chattels were on the said premises owned by and in the possession of said McMurray until they came into the possession of the said assignee, and so continued up to the time of the distress hereinafter mentioned on said premises, and were the same goods seized as hereinafter mentioned by the defendants.

That the mortgagees never elected to rank on the estate of said insolvent as creditors on account of their said mortgage: that on the 1st day of August, 1874, an instalment consisting partly of principal and partly of interest, and amounting to \$658.34, became due and was payable under said mortgage.

That on the 17th day of December, 1874, the said defendants, by a distress warrant reciting said mortgage, covenants and provisoes, and that the said instalment became due on the date aforesaid, and was in arrear and unpaid, authorized their bailiff to seize, and their said bailiff did seize and take possession of said goods and chattels, formerly belonging to the mortgagor, to pay the said amounts due by sale of the same in the usual manner as in cases of distress: that said

goods were at the time of such seizure on the said premises, and were taken from the possession of the plaintiff as assignee in insolvency of the said McMurray, and the said goods were of sufficient value, if sold under the said seizure, to pay the whole claim of the defendants: that the said plaintiff as such assignee claimed the said goods so seized as against the said defendants: that the said defendants claimed said goods as against the said assignee, and that they ought to be paid out of the said goods the amount then in arrear and unpaid on the said mortgage, together with the costs of seizure and costs incidental thereto.

The question submitted is. Is the plaintiff, as such assignee, entitled on the facts stated to the said goods as against the defendants?

If yes, then the Court shall order the said goods to be delivered up to the said assignee, and that such damages be paid as the Court shall deem reasonable and just, and that the defendants pay the plaintiff the costs of suit.

If nay, and the Court shall be of opinion that the said defendants were entitled on the facts stated to the said goods as against the said assignee, then the Court shall order the plaintiff as such assignee to pay the said instalment and interest to the said defendants, and also costs of distress and suit.

March 10, 1875. *Ritchie*, for the plaintiff. The defendants have no right to distrain on the assignee of the mortgagor. By the Insolvent Act of 1869, sec. 50, the defendants' only remedy for the non-payment was by an application to the Judge of the County Court: *Dumble v. White*, 32 U. C. R. 601; *Crombie v. Jackson*, 34 U. C. R. 575. The defendants, as mortgagees, are not landlords, and have not the right to distrain the goods of any other on the premises than those of the mortgagor. The words of the mortgage, "by way of rent reserved as in the case of a demise of the lands," do not make the relation of landlord and tenant: *Royal Canadian Bank v Kelly*, 19 C. P. 196; S. C. in appeal, 22 C. P. 279; *Freeman v.*

Edwards, 2 Ex. 732. The defendants had no lien on the goods after the assignment in insolvency, under sec. 10. By sec. 81 the landlord's claim for rent extends to only one year, but he has no such preference until after distress made: *Mason v. Hamilton*, 22 C. P. 411, in appeal, reversing S. C. 190.

Beaty, Q.C., contra. The assignee in insolvency is in no better position with respect to the distress than the mortgagor whom he represents. The goods after the assignment were on the mortgaged premises at the time of the distress, and as the defendants could have distrained them in the hands of the mortgagor, they could equally do so in the hands of his assignee: *Collver v. Shaw*, 19 Grant 599; *Thompson v. Simpson*, L. R. 5 Ch. 659; *Kirkman v. Shawcross*, 6 T. R. 14. It is not argued now that the defendants could have distrained the goods of the mortgagor after their removal from the mortgaged premises. The assignee while in possession was subject to all the covenants and liabilities of the assignor: *Magnay v. Edwards*, 13 C. B. 479; *Wakefield v. Brown*, 9 Q. B. 209; *Robson on Bankruptcy*, 2nd ed., 290, 384. The defendants were not obliged to apply to the Judge of the County Court for relief, because they have not proved their claim, and being secured they were not obliged to come into the winding up: sec. 143. By sec. 41 the mortgaged property may be sold. By sec. 58 the rank or privilege of creditors is not to be disturbed. The defendants are entitled to the year's rent by sec. 81, and they are also entitled to the rent for such further time as the assignee continues in possession. Sec. 50 of the Act is not imperative upon all creditors: *Archibald v. Haldan*, 30 U. C. R. 30; *Crombie v. Jackson*, 34 U. C. R. 575; *Burke v. McWhirter*, 33 U. C. R. 1. He referred also to the English Winding-up Act, "The Companies' Act, 1862," sec. 163: *In re Exhall Coal Mining Co., Limited*, 4 DeG. J. & S. 377; *In re Lundy Granite Co., Ex parte Heaven*, L. R. 6 Ch. 462; *In re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire R. W. Co.*, L. R. 19 Eq. 60.

Ritchie, in reply. The case of *Freeman v. Edwards*, 2 Ex. 732, shews the defendants have not the right to distrain on the assignee. If the defendants claim by virtue of a lien on the goods, the right of lien should have been protected by filing the mortgage in the office of the County Court as a claim against the goods of the debtor. The case shews that not only was the distress made after the assignment took place, but that the instalment for which the distress was made fell due after the assignment.

May 4, WILSON, J.—The cases of *Dumble v. White*, 32 U. C. R. 601, and *Crombie v. Jackson*, 34 U. C. R. 575, shew that the assignee in insolvency is not a trespasser for taking as such assignee the goods of the debtor who had them in his possession at the time of his making the assignment rightfully, by the terms of the mortgage, or with the assent of the creditor; and that the mortgagee cannot take the goods mortgaged to him from the custody of the assignee who has got them as such assignee rightfully from the mortgagor. The remedy in such a case is that which is provided for him by the 50th section of the Act.

Admitting that the words of the covenant constituted a demise between the mortgagees and mortgagor, so that the mortgagees could distrain for the arrears of the mortgage money just as for rent in an ordinary case; and admitting that the plaintiff as assignee in insolvency entered into and was in possession of the mortgaged, and for this purpose the demised premises, at the time of the distress, the question is, had the defendants the right to distrain—or were they bound to apply to the Judge of the County Court for relief under the 50th section of the statute?

The case of *Griffith v. Brown*, 21 C. P. 12, was for a distress which was made after the assignment in insolvency, but before the passing of the Act of 1869.

The case of *Mason v. Hamilton*, 22 C. P. 190, and in appeal 22 C. P. 411, was for and in respect of a distress made before the assignment in insolvency, but not perfected by a sale at the time the assignment was made. The

decision in the former case under a clause in the Act of 1865, similar to the 81st section of the Act of 1869, and the decision in the first case, and in the last case also in appeal, was that only one year's rent could be recovered.

There was no question in the last of these two cases, although all the matters in the cause took place since the passing of the Act of 1869, whether the distress could rightfully be made by the landlord, that is, whether his remedy was not under the 50th section of the Act, because the distress in that case *had* been made before the assignment in insolvency was executed. The Court in that case held that although the distress had been made for six years of arrears of rent, the landlord was restricted to only the one year's rent as a preferential lien under the 81st section.

Here a distress has been made, and it has been made after the assignment and transfer of all the debtor's estate and effects to the plaintiff; and the 50th section says that "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in, or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever."

This claim for the mortgage instalment proceeded for by way of distress for rent in arrear, is a remedy sought for enforcing a claim for a debt and mortgage upon, in, or to the effects or property in the hands, possession, and custody of the assignee, and it is therefore not to be obtained by any seizure or other proceeding, but by a summary application to the Judge or the Court.

I think there is no way of getting over the terms of this enactment, unless the later sections, 77 to 81, require that a different construction should be given to the case of a lease.

I think that this case must be disposed of as if it were an ordinary lease, in place of its being only, as I may say, formally and technically so, for the mere purpose of afford-

ing a speedier and more efficient remedy for the recovery of the arrears of the mortgage money than can ordinarily be had. The primary transaction is a mortgage and not a lease, but I cannot say there is not a lease in strict law, and the usual remedy as for rent under it.

Upon looking at the sections in the statute relating to leases, I see nothing in them which in my opinion controls or alters the provisions of the 50th section.

By the 81st section the claim for rent is a preferential lien, as it is called, "so long as the assignee shall retain the premises leased."

But that lien is one of the very claims or forms of claim which is not to be made "by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever" other than by a summary application to the Court or Judge, as before stated.

I do not see how else to give effect to this section than by holding that the defendants had not the right to make the distress after the making of the assignment.

The cases cited by Mr. *Beaty* at the conclusion of his argument, shew that a creditor who is landlord cannot, after a winding up has begun, distrain on the goods of his tenants, the company which is being wound up, without the leave of the Court, although he may take the company's goods if they are on the demised land and if the distress is against a stranger, for in that case the landlord is not a creditor of the company at all.

I must therefore find that the plaintiff as such assignee was not entitled to the said goods distrained upon as against the defendants; and I order that the said goods be delivered to the assignee, and that the plaintiff do recover from the defendants the sum of ten dollars for his damages sustained by and in respect of the said seizure, and also his costs of suit, and that the defendants do pay the said respective sums of money to the plaintiff.

Rule accordingly.

IN RE KENNEDY, AN INSOLVENT, MASON V. HIGGINS.

Insolvency—Claim for rent.

A landlord in case of his tenant's insolvency, has no privilege or preference for rent over any other claim; his only protection lies in his right to a preferential lien on property on the demised premises.

On the facts set out in this case, it was held that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal.

APPEAL from an order of the County Court of the County of Kent, made 19th February, 1875, by which Mason, the official assignee, was directed to place the claim of E. J. Higgins on the first dividend sheet as a privileged claim for rent, due within a year next before the assignment in insolvency, for the sum proved by her, with her costs out of the estate.

The materials before the Court seemed to have been, Mrs. Higgins's petition, merely stating that she had an unsatisfied claim for rent, and had duly proved, but that the assignees would not pay; and her affidavit to the same effect.

Her first affidavit of claim seemed to have been mislaid. She was called to file a duplicate claim.

Mr. Douglas, her attorney, swore that in the preceding May the subject of her claim for rent was discussed between him and the assignee, who admitted it was due, but claimed certain deductions, "and he offered to pay a sum of about \$80; or acknowledged that, according to the accounts of the insolvent, the sum of \$80 was due her."

Among the papers was an affidavit of the claimant, dated 31st of July, 1874, swearing that the insolvent owed \$11.37, for which she held no security.

Another affidavit by her was put in, sworn on the 19th of February, 1875, the date of the Judge's order: that the insolvent was indebted to her in \$113 for rent, due to her for the shop the firm occupied from May, 1873, at the yearly rent of \$18 per month, and seven months rent less \$13 was justly due to her; and that she held no security for her claims.

This was put in as a duplicate of her former proof—the Judge in his order directing her to file a duplicate of the former affidavit proving her claim.

Another affidavit of the claimant, sworn 23rd December, 1874, was apparently filed on 19th February, the day the order is dated. In this she swore that the insolvent owed her the money for rent: that her claim was made and put in to the assignee of the estate, who received and admitted it, but questioned \$10 of the amount, but had refused to pay.

In opposition, the assignee filed an affidavit sworn 16th February, 1875. He said he did acknowledge that \$80 for rent was due, but he never offered to pay it, being advised it could only rank as an ordinary claim, and that the landlord's preferential lien was confined to the right of distress, which right had never been exercised: that he had not yet realized all the assets, particularly certain goods which were in the premises in question at the time of the insolvency, which had since been received without his assent, as he believed, by the insolvent, and which he has been unable to recover. He denied that he ever made any agreement with the claimant to pay that rent in full.

These were all the papers that appeared to have been in existence up to the date of the order to pay.

March, 30, 1875. The appeal was argued by *J. K. Kerr* for appellant. No actual distress was made, and the claim is not privileged. No distress could in fact have been made, as no goods appear to have been on the premises. [*O'Brien*, contra, wished to read an affidavit to shew that there were goods on the premises. *Kerr* objected, that no materials could now be used which were not before the Judge below. The objection was sustained.] The fact that the claim was put in shews that the privilege was waived. He referred to *Mason v. Hamilton*, 22 C. P. 190, 411; *Griffith v. Brown*, 21 C. P. 12; Insolvent Act of 1869, secs. 10, 50, 59; *Robson on Bankruptcy*, 238.

O'Brien, contra. Merely putting in a claim is no waiver.

The affidavits shew no distress was made, because the assignee gave an assurance that he would see the rent paid. In this case, no distress was necessary. Sec. 81 of the Insolvency Act only applies when the insolvency is immediately subsequent to the distress.

April 2, 1875. HAGARTY, C. J. C. P.—On the face of these documents filed I can certainly see no ground whatever for ordering this claim for rent to be paid as privileged.

The whole case seems to me to have been treated under a misconception on the claimant's part as to her rights.

There is no privilege or preference given to a landlord for *rent* over and above any other claim. His only protection seems to me to lie in his right and power to enforce a preferential lien on property in the demised premises for a year's rent.

The law does not allow property on the premises to pass into the hands of the assignee to the prejudice of the landlord's lien on such goods.

In the application made to the Court below, the claimant seems to make no allusion whatever to any goods on the premises, but seems to assume that because the claim is for rent, that therefore as such it is privileged. I never understood there was any such privilege. The first mention of any goods is in the assignee's affidavit. Nothing whatever is said of their value. They are said to be elojned by the insolvent, and the assignee never appears to have had any portion of them.

I therefore see nothing whatever to support this order of February 19, 1875.

I find among the papers another affidavit of Mr. Douglas, sworn on the 5th of March, 1875, attached to the Judge's order, intended to be used in this appeal. He swears that the assignee never disputed the claim as not being proved: that in May, 1874, he discussed the claim with witness: that there then were goods of the insolvent's estate on the premises which could have been seized for the rent claimed,

but which were removed, he thinks, in or shortly before July : that he never had any intimation that the assignee intended to treat the claim other than as privileged : it was only the amount that was in dispute, and if that was settled he understood the assignee would pay the balance in cash at once ; and it was not till the hearing on the order he knew it was disputed as being privileged.

On the same day James Higgins, husband and agent for the claimant, swears that a few days after the assignment in insolvency he issued a distress warrant for \$113, and placed it in a bailiff's hands to distrain the insolvent's goods for rent : that the premises being then locked he called on Mr. Black, the interim assignee, and told him what he had done ; Black asked him not to distrain, but to have the claim proved, and he would have it paid as soon as possible.

He then saw Mr. Douglas, who drew the affidavit for the claimant, who swore to it, and in turn delivered it to Black : that he often applied to Mason, the assignee, but has never been paid.

I do not understand that any evidence, such as is contained in these two affidavits, was before the Court below.

The new evidence, if I even can read it on this appeal, is still silent on the main questions. There is nothing to shew that the assignee, acting for the creditors, ever obtained possession of any goods that might have been distrained, nor whether the goods said to be distrainable were worth five shillings or not.

As I have already said, the whole case seems to have been treated as if a landlord's claim for rent is privileged over other claims. The privilege can only be obtained or realized by its operation as a lien on goods. The assignee here has evidently got nothing, and it seems not easy to see how he has derogated from the landlord's lien.

Section 50 of the Act of 1869 provides that all remedies "for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in, or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge on

summary petition," and obedience may be enforced on the assignee, &c., and not by suit.

Then section 81 limits the preferential lien of the landlord for rent to "one year's arrears last previous to the insolvency, and from thence so long as the assignee shall retain the premises leased."

This case shews nothing of the assignee ever meddling with the goods, or retaining or getting possession of claimant's premises.

But it may be urged that but for the promise of the interim assignee there were goods that could have been distrained, and therefore the claim ought to be paid.

As before noticed, there is no suggestion even of the value of the goods, and it is clear from the papers that no such case was urged before the County Court to obtain this order. It is not even now urged that Mason ever made any promise on which the claimant abstained from distraining.

Nor has it been attempted either then or now to shew that the goods have been lost through any default of the assignee, or that the claimant held any lien on property sufficient to secure her claim or any part of it.

On the contrary, in what appears to be put forward as her affidavit of debt or claim, she swears she holds no security for her claim.

Then, on what ground has she shewn any right to stand in any better position than ordinary creditors?

I think the order made cannot be supported.

It is not necessary for me to discuss whether any and what further proceedings can or may be taken either in the Insolvent Court or elsewhere, or whether or not an action will lie in favour of a landlord, to whom a person promises to pay the amount due him for rent in consideration of the landlord forbearing to press a distress, and abandoning it in consideration of the promise.

I think the order in the Court below must be revised by making it an order discharging the summons issued on the assignee, with costs to be paid by the claimant.

I think the assignee must be allowed his costs of appeal out of the estate. But I do not direct the claimant to pay the assignee's costs of appeal.

Appeal allowed.

POTTS V. LEASK AND RYERSE.

Co-contractors—Payment by one—26 Vic. c. 45.

An action having been brought and a judgment recovered against two defendants on a contract by them to carry certain lumber, the verdict and costs were paid by one defendant, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in the plaintiff's name against the other defendant for one-half of the debt and costs.

Held, clearly not warranted by the 26 Vic. c. 45, and the execution was set aside.

May 17, 1875, *J. B. Read* obtained a rule calling on defendant Ryerse to shew cause why the execution issued on the judgment in this case should not be set aside on the ground that the said execution was issued against the consent and without the authority of the plaintiff, and without the defendant Ryerse having complied with the requirements of the statute in the case of one co-contractor proceeding to enforce a judgment recovered against him and his co-contractor; and on the ground that the facts do not warrant the defendant Ryerse in using the statute to aid him in recovering upon the judgment in this cause one half the debt and costs recovered by the summary method of issuing an execution therefor.

A. Cassels, shewed cause, and *J. B. Read* supported the rule.

The facts are stated in the judgment.

June 19, 1875, GALT, J.—It appears that this was an action brought to recover damages upon a contract made by the defendants to carry a quantity of lumber, in which the plaintiff recovered a verdict against both the defendants. The verdict and costs were paid by the defendant Ryerse

who then, without applying to the plaintiff, or tendering him any indemnity, issued an execution in his name against the defendant Leask to collect one half of the debt and costs.

By sec. 2 of the Act to amend the laws of Upper Canada affecting Trade and Commerce, 26 Vic., ch. 45, it is enacted : " Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or a trustee for him every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty."

Sec. 3 : " And such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and on proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debts or performed such duty ; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him."

Sec. 4 : " No co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person shall be justly liable."

It might be sufficient for the purpose of this rule to say that the defendant Ryerse has taken the step herein complained of without obtaining the authority of the plaintiff to use his name or giving or tendering to him a proper indemnity, as I can find no case in which such a course has been pursued ; but there is another and very serious objection to the proceedings of the defendant.

The fourth section would be of no use whatever, if in a

case like the present, the one defendant in the original action could at once, without regard to their relative rights and liabilities, proceed to collect from his co-defendant one half of the debt and costs.

The agreement between those parties was that each should carry an equal amount of the lumber, and it appears that it was owing to the default of the defendant Ryerse that the contract was not fulfilled, as appears from the affidavit of Mr. Robb, filed on this application; and in consequence he advised the plaintiff not to execute an assignment, although he had been applied to for that purpose. If, then, the defendant Ryerse could issue an execution on the original judgment, as he has done, without the consent of the plaintiff, and levy one half the debt and costs on his co-defendant, it appears to me that the provisions of the fourth section would be entirely nugatory.

Rule absolute, with costs. No proceedings to be taken against the sheriff for anything done under the writ.

Rule absolute.

GWATKIN ET AL. V. HARRISON.

Corporation—Sci. fa. against shareholders.

^cThe 27-28 Vic., ch. 23, sec 27, incorporating the defendants, enacts that every shareholder, until his stock has been paid up, shall be liable to the creditors of the company to the amount unpaid thereon; "but shall not be liable to an action therefor by any creditor" until an execution against the company has been returned unsatisfied, &c.

Held, that *sci. fa.* would lie by a judgment creditor of the company against a shareholder, though the general practice here is to proceed by action, for a *sci. fa.* is in fact an action.

THIS was a proceeding by *sci. fa.*

Declaration, that a judgment was recovered on the 25th November, 1872, by the plaintiffs, against The Church Printing and Publishing Company, in this Court: that the said company is incorporated under 27-28 Vic., ch. 23, and 29-30 Vic., ch. 23: that execution issued thereon,

but that there could not be found sufficient property whereon to levy, and that execution still remained to be made: that the defendant is the holder of ten shares, and \$100 still remains unpaid thereon; wherefore the plaintiffs pray that they be allowed to issue a writ of *sci. fa.* for having execution against the defendants on said judgment, to the extent of monies unpaid on his stock, &c. Therefore the defendant is required to appear, &c., to shew cause, &c., why the plaintiffs ought not to have execution against him of said judgment, &c.

The defendant appeared, and demurred, on the ground that no cause of action was disclosed; that *sci. fa.* would not lie; and the remedy, if any, was by action on the case.

Joinder.

January 29, 1875. The demurrer was argued by *F. Osler* for the plaintiff. Under the English Acts the remedy by *sci. fa.* is expressly given, but the leave of the Court must be obtained on special application before it is sued out: *Foster on Sci. Fa.*, 112, 113, 143, 154. At common law no execution could issue against a shareholder of a public company: *Hodges on Railways*, 5th ed., 94, app. 30; *Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925; 3 *Stephen's Comm.* 175. No instance can be found in our reports of a *sci. fa.* having been brought on a statute containing provisions similar to those contained in the Joint Stock Company's Act in question here. See *Moore v. Murphy*, 11 C. P., 444; *Jenkins v. Wilcock*, 11 C. P. 500. In the latter case it is expressly said, at p. 508, that the judgment is not the foundation of the action. The latter is "founded on the liability created by the statute." The judgment is a "necessary preliminary, but the cause of action rests on other and different grounds." See also *Port Whitby & Port Perry R. W. Co. v. Jones*, 31 U. C. R. 170; *Fraser v. Robertson*, 13 C. P. 184; *Smart v. McBeth*, *Ib.* 27. He also referred to 27-28 Vic., ch. 23; Consol. Stat. C., ch. 66, sec. 80; 31 Vic., ch. 68, sec. 18; Imperial Acts 7 & 8 Vic., ch. 110, sec. 66; 8 & 9 Vic., ch. 16, sec. 36; *Lee v. The Bude & Torrington R. W. Co.*, L. R. 6 C. P. 576.

T. Ferguson, contra. Sci. fa. is an appropriate remedy. This is recognized by all the authorities on the subject, and the fact that the statute gives an action in addition to the former remedy does not take away that former remedy, but the plaintiff has his option to choose either course he thinks proper. He cited *Clowes v. Brettell*, 11 M. & W. 461; *Shrimpton v. Sidmouth R. W. Co.* L. R. 3 C. P. 80; *Ilfracombe R. W. Co. v. Devon & Somerset R. W. Co., Re Lord Poltimore*, L. R. 2 C. P. 15; *Williams v. Sidmouth R. W. & Harbour Co.*, L. R. 2 Ex. 284; *Scott v. Uxbridge & Richmansworth R. W. Co.* L. R. 1 C. P. 596; *Harrison's C. L. P. Act*, sec. 311, 148, and notes.

February 6, 1875. HAGARTY, C. J. C. P.—It has been the general practice in our Courts, in these cases, to proceed by action on the case.

The different wording of the Imperial and Canadian statutes has caused this question to arise. It seems unfortunate that where it is apparently designed to give the same substantial relief to creditors as existed in England, the same words should not have been used in our statute.

The words of the Imperial statute, 8 & 9 Vic., ch. 16, sec. 36, are, "If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action * * shall have been brought or instituted, made upon motion in open Court after notice in writing to the person sought to be charged; and upon such motion such Court may order such execution to issue accordingly."

Sec. 37, "If by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall

forthwith be reimbursed such additional sum by the directors out of the funds of the company."

On this statute the cases since 1845 have been decided; and although in a perfectly clear case the Court, on motion after notice, may allow execution to issue, the practice is, that the proceedings against the shareholders shall be by *sci. fa.*

The statute governing this case is 27-28 Vic., ch. 23, sec. 27: "Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company, to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor, before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable, with costs, against such shareholders."

This clause is in substance like that contained in the Railway Clauses Consolidation Act, Consol. Stat. C., ch. 66, sec. 80. This is taken from 14 & 15 Vic., ch. 51.

The Railway Act of 1868 differs in omitting the last clause as to the amount due on the execution; and the Acts contain nothing as to indemnity contained in the Imperial statute.

Our Common Law Procedure Act, sec. 311, passed after it was part of the statute law making shareholders liable as above, enacts: "All writs of *sci. fa.* against bail on a recognizance, or against members of a joint stock company or other body, or upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself and all such writs by or against a husband to have execution of a judgment for or against a wife * * shall be tested, directed, and proceeded upon in like manner as writs of revivor."

It is evident from this that our Legislature assumed the proceeding by *sci. fa.* to be the appropriate method to charge shareholders in favor of the judgment creditors. In consequence of the different wording of the statutes, I

have thought it necessary to look into the nature of this proceeding.

In *Fenner v. Evans*, 1 T. R. 267, a motion was made to set aside a *sci. fa.* to revive a judgment and execution thereon. It was under the Annuity Act.

Ashurst, J., says, p. 268 "The execution must certainly be set aside, and the only question is as to the *sci. fa.*; but a *scire facias* is an action; and then this comes within the second section of the Act, for the words are, 'No action shall be brought on any such judgment already entered.' The *sci. fa.*, therefore as well as the execution must be set aside."

Buller, J., said, "There is no doubt but that a *sci. fa.* is an action; and on that ground it has been held that a plea to a *sci. fa.* must conclude 'if the plaintiff ought to have or maintain his action.'"

See *Grey v. Jones*, 2 Wils. 251, where Lord Coke is cited, that "Albeit a *sci. fa.* be a judicial writ, yet because the defendant may thereunto plead, this *sci. fa.* is accounted in law to be in nature of an action, and therefore a release of all actions is a good bar of the same." Co. Lit. 290, b.

Winter v. Kretchman, 2 T. R. 45, was a *sci. fa.* to revive a judgment by assignees of a bankrupt. Ashurst, J., said, p. 46 "I cannot distinguish between a *sci. fa.* and an action brought by the assignees of a bankrupt. There is no reason why it should be necessary to state a title more particularly in this one than in the other."

Buller, J., said: "It has been held in a variety of cases that a *sci. fa.* is an action."

In *Holmes v. Newlands*, 5 Q. B. 367, 634. the Court considered the *sci. fa.* resembled an action of debt on the judgment. The proceeding is, in effect, a new action.

Again, at page 638, Lord Denman says that "It is a new complaint that the proceeding (by *sci. fa.* to revive a judgment) should be adopted rather than an action on the judgment."

Commenting on the Imperial Act, 8 & 9 Vic., ch. 16, sec. 36, Willes, J., says, in *Lee v. Bude and Torrington Junc-*

tion *R. W. Co.*, L. R. 6 C. P. 576, 580, "It is obvious, therefore, that the proceedings under that section are meant as a supplement to the proceedings against the company, to enforce against the shareholders the payment of that which they are liable to pay towards the capital of the company. In reality they are no more than executions against a particular kind of property of the company."

As to pleading any plea that could have been pleaded to the action on the judgment, see *Fowler v. Rickerby*, 2 M. & G. 760, 774, citing *Com. Dig. Pleader*, 3 L. 13: "If there be *sci. fa.* against an heir, or terre-tenants, after judgment against the ancestor, he shall not plead any matter in avoidance of the judgment, though the judgment was by *nil dicit*." To the same effect are *Bradley v. Urquhart*, 11 M. & W. 456, and *Bradley v. Eyre*, *Ib.* 432.

In *Jefferson v. Morton*, 2 Wms. Saund., ed. 1871, 12, it is said "The rule being that where a new person, who was not a party to a judgment or recognizance, derives a benefit by or becomes chargeable to the execution there must be a *sci. fa.* to make him a party to the judgment or recognizance."

At common law, if execution was not sued out in a year and a day, an action of debt had to be brought on the judgment or recognizance.

The Statute of Westminster, 2, (13 ed., I.) ch. 45, gives a *sci. fa.* on a judgment in personal actions. A *sci. fa.* lay at common law after that time in real actions: *Underhill v. Devereux*, 2 Wms. Saund., ed. of 1871, 225.

A *sci. fa.* is a judicial writ founded on some matter of record, as a recognizance either at common law or by statute, judgment, letters patent and the like, to enforce the execution of them, or to vacate or set them aside; and as the defendants may plead thereto, it is considered in law as an action, and in the nature of a new original.

The rule is stated thus in *Pennoir v. Brace*, 1 Salk 319: "Where any new person is to be better or worse by the execution, there must be a *sci. fa.*, because he is a stranger, to make him a party to the judgment, as in the case of an

executor or administrator; otherwise, where the execution is neither to charge or benefit any new party, as * * where there is a survivorship."

In *Cocks v. Brewer*, 11 M. & W. 56, the Court say: "The *sci. fa.* is a quasi continuation of a matter of record, in order to have execution thereon. * * But an action of debt on a judgment, being founded on the consequent duty, is not to be differed in principle from the ordinary case of an action of debt against one of several joint contractors; to which an objection cannot be taken on the ground of variance, but only, if at all, by way of plea in abatement."

In *Co. Lit.* 291, *a*, it is said: "*Sci. fa.* is accounted in law to be in the nature of an action. * * Every writ whereunto the defendant may plead, be it original or judicial, is in law an action."

It is said in *Obrian v. Ram*, 3 Mod. 189, an action of debt will lie upon a judgment in a *sci. fa.*, which shews that it is an action distinct from the original.

In *Cross v. Law*, 6 M. & W. 223, in deciding that *sci. fa.* was necessary, Lord Abinger says: "It is true these joint stock banks place the public in a very disadvantageous position, for it now appears that in these cases there must, or probably will, be a trial of two actions instead of one: first, in order to establish the claims of the creditor against the company; and secondly, to fix the particular individual liable to execution. * * The rule is, wherever you seek to fix one party on a judgment given against another, it must be done by *sci. fa.*; and I think that is a principle which applies to the case of a public officer, who is merely the representative of the parties sought to be charged."

It seems to me, that under our Act we are to assume:—
(1) That the shareholder is privy to the judgment recovered against the company or corporate body of joint adventurers, of which he is a member.

(2) That he cannot offer any plea to impugn that judgment on the merits, assuming it to have been regularly recovered; and (3) that the amount due on the execution obtained against the company, is the amount (with costs) for which the shareholder is liable.

If so, it appears to me, that in such a state of facts *sci. fa.* is an appropriate remedy.

The defendant here urges that the words, "shall not be liable to an action therefor," shew that *sci. fa.* is not the remedy. I do not feel bound to accede to this view. The cases cited shew that in terms the proceeding by *sci. fa.* is, in fact, an action.

The case of *Winter v. Kretchman*, 2 T. R. 46, is express on that head; so is *Fenner v. Evans*, 1 T. R. 267. There is, therefore, no difficulty on this verbal objection.

The whole proceeding is, in effect, to obtain execution against the unpaid stock, which is, in reality, the assets and property of the company.

So it is treated by Willes, J., in the case cited of *Lee v. Bude and Torrington Junction R. W. Co.*, L. R. 6 C. P. 576; and by Bovill, C. J., in *The Ilfracombe R. W. Co. v. Lord Poltimore*, L. R. 3 C. P. 288.

See also *Bartlett v. Pentland*, 1 B. & Ad. 704; *Harwood v. Law*, 7 M. & W. 206; *Bosanquet v. Ransford*, 11 A. & E. 520; *Clowes v. Brettell*, 10 M. & W. 461; *Chitty's Arch.*, title "*sci. fa.*"

My judgment is, that the plaintiffs are entitled to proceed by *sci. fa.*, and that the demurrer be overruled.

Judgment for plaintiffs.

IN THE COURT OF ERROR AND APPEAL.

THE ONTARIO SALT COMPANY, Plaintiffs in the Court below, *Respondents*, and PATRICK LARKIN, Defendant in the Court below, *Appellant*.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.

One H. had chartered a schooner from Goderich to Chicago, and not being able to fill her, told the plaintiffs' agent that they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington & Quincey R. W. Co., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage about 300 barrels of the deck load, not being part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs only got 610 barrels.

Held, in the Court of Queen's Bench: 1. That the owner of the vessel, and not H., was her owner for the trip, and the contractor with the plaintiffs. 2. That if the master delivered the salt on the dock as H.'s salt when it was in fact the plaintiffs', the defendant would be answerable: that there was some evidence of his having done so; and that a verdict for the plaintiffs, therefore, should not be disturbed. On appeal this judgment was affirmed.

Per Strong, J.—It is the duty of the captain not merely to deliver the goods on the wharf, but as far as possible to separate the different consignments, so as to render them accessible to their respective owners.

APPEAL from the judgment of the Court of Queen's Bench, discharging a rule *nisi* to enter a nonsuit. The facts and evidence are fully set out in the report 35 U. C. R. 229, and are stated in the judgment of Patterson, J., p. 491.

The following were the grounds of appeal:

1. That there was no evidence of any agreement or contract on the part of the defendant, with the plaintiffs, to carry the goods, as alleged.

2. That the evidence shewed that if there was any such agreement or contract, the defendant performed it.

3. That the evidence shewed that the defendant contracted with one D. G. Holland, to carry the cargo to Chicago, and that the said cargo was carried and delivered to said D. G. Holland or his agent.

4. That all said cargo, except what was jettisoned, namely, the deck cargo, which was at shipper's risk, was delivered to one Haines, from the rail of the vessel, and that by the custom of the Port of Chicago, such delivery was a performance of the contract to carry, if any.

The following cases and authorities, amongst others, were relied on by the defendant: *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389, 397; *Petrocochino v. Bott*, L. R. 9. C. P. 355; *Abbott on Shipping*, 11th ed., 334; *Cobban v. Downe*, 5 Esp. 41; *Story on Bailments*, 8th ed., 500; *Jones on Bailments*, 4th ed., 97; *British Columbia &c. Co. v. Nettleship*, L. R. 3 C. P. 499; *Addison on Torts*, 4th ed., 486; *Bourne v. Gatliffe*, 3 Scott, N. R. 1; 7 M. & G. 850; *Syeds v. Hay*, 4 T. R. 260; *Wardell v. Mourillyan*, 2 Esp. 693; *London and North Western R. W. Co. v. Bartlett*, 7 H. & N. 400.

Reasons against the appeal :—

1. There was sufficient evidence of an agreement or contract by defendant to carry the plaintiffs' goods as alleged.

2. The arrangement between the defendant and Holland, did not give the latter possession of the vessel, or the control of her master or crew, nor in any way constitute him owner for the voyage. It amounted in effect only to an agreement to carry a cargo which he ultimately did not wholly supply. The defendant remained the owner for the voyage, and was at liberty to contract, and through the master of his vessel did contract with the plaintiffs to carry their goods, as alleged: *Abbott on Shipping*, 11th ed., 37; 3 *Kent's Comm.*, 11th ed., 137, 138; 1 *Parsons on Shipping*, 294-298, 299, 300; *Christie v. Lewis*, 2 Brod. & Bing. 410; *Dean v. Hogg*, 10 Bing. 345; *Fletcher v. Braddick*, 2 B. & P. N. R. 182; *Fenton v. Dublin Steam Packet Co.*, 8 A. & E. 835; *Towse v. Henderson*, 4 Ex. 890; *Neill v. Ridley*, 9 Ex. 677.

3. The evidence shews that the defendant did not perform his contract or duty, but delivered part of the plaintiffs' goods to other parties, which goods have become wholly lost to the plaintiffs.

4. The evidence also establishes that the defendant was guilty of a conversion of the plaintiffs' goods, as charged; *Wilbraham v. Snow*, 2 Wms. Saund. ed. of 1871, 103; *Browne on Carriers*, 473; *Angell on Carriers*, 4th ed., secs. 324, 325, 326; *Duff v. Budd*, 3 Br. & Bing. 177; *Stephenson v. Hart*, 4 Bing. 476; *Wyld v. Pickford*, 8 M. & W. 443, 461; *Devereux v. Barclay*, 2 B. & Al. 702; *Eubank v. Nutting*, 7 C. B. 797; *Schuster v. McKellar*, 7 E. & B. 704; *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Hiort v. Bott*, L. R. 9 Ex. 86; *Stevens et al. v. Boston and Maine R. W. Co.*, 1 Gray 277; *Myer v. Chicago and North Western R. W. Co.*, 24 Wis. 566.

December 15th, 16th, 1874. (a). The appeal was argued. by *C. Robinson*, Q. C. and *J. A. Miller*, for the appellant defendant, and by *S. Richards*, Q. C., for the respondents. The argument was substantially the same as that in the Court below, and the authorities cited, in addition to those below, will be found in the reasons of appeal.

March 15, 1875, STRONG, J.—On the opening of this appeal the learned counsel for the appellant very properly gave up as untenable the contention that the contract was with Holland, and that the appellant, as the owner of the schooner, was not liable to the respondents for any mis-carriage of the goods through the default of the master.

There, therefore, only remains the question as to whether the dealing with the goods at Chicago amounted to a conversion of that portion of the plaintiffs' salt which got into the possession of Holland, and which I estimate to have been about 360 barrels.

(a) Present—DRAPER, C. J. of Appeal; STRONG, J.; BURTON, J., and PATTERSON, J.

Primâ facie a conversion is established by the plaintiffs shewing that a portion of these goods, which it was the duty of the captain to deliver to their consignee at Chicago, actually got directly from the captain's custody into the possession of Holland, a stranger, and was by him dealt with as his own property.

Then how does the defendant exonerate himself from the first presumption against him arising from this undisputed fact ?

In the first place, he alleges that he placed the goods in question on the wharf, which he says was all that he was in law bound to do, and that it was the duty of the plaintiffs' consignee to seek out his own goods.

The answer to this is, in my judgment, plain. The law required the master to give notice to the plaintiffs' agent of the arrival of the goods. This duty he assumed to perform by himself stating to Cooke, the consignee, that 390 barrels belonging to plaintiffs had been thrown overboard, and only 610 remained for delivery. After this it does not lie in the mouth of the defendant now to say that Cooke had not a right to rely on this notice, and act on it so far as not to demand delivery of any greater quantity than that which the captain thus virtually offered to deliver to him, and for which he demanded and received freight. Then, having given this notice, the captain further acts on the statement by delivering the 360 barrels belonging to the plaintiffs to Holland.

According to high American authority, it was the duty of the captain not merely to deliver the goods on the wharf, but "as far as possible to separate the different consignments, so as to render them accessible to their respective owners": *Ship Middlesex*, U. S. C. C. Mass., 21 Am. Law Reporter, 14; *Parsons on Shipping*, vol. 1, page 224.

This was not done, but so far from it, the 360 barrels for which the plaintiffs claim to recover were put into the same lot with Holland's own salt. How can it be said after this, that the plaintiff's salt did not find its way into Holland's possession through the act of the captain ?

It surely cannot be said that the consignee was bound to go to the vessel to look for salt which the captain assured him had been thrown overboard; and that his negligence in this respect excuses the conduct of the captain.

I regard the legal effect of the statements and conduct of the captain, taken in connection, as being precisely the same as that which would have followed, if both Holland and Cooke had gone on board the vessel on her arrival, and the captain had then told Cooke that he would deliver to him 610 barrels and no more, and that the residue of the plaintiffs' salt must go to Holland; and in that case there could be no doubt but that a subsequent delivery to Holland would have been a conversion.

The defendant assumes that all the captain had to do was to remain passive, and to let the several consignees select and carry away their respective goods.

The authorities cited and many others shew that this was not so, but that the captain was bound to allot and deliver the cargo to the respective owners, or at least to place them on the wharf properly distributed.

The evidence shews, that so far from this being done there was a mis-delivery of the plaintiffs' goods, with the concurrence of the master, which has led to their loss.

If the captain had given no notice whatever of the arrival of the vessel, and had discharged all his cargo on the wharf without separation, Holland's salt and the plaintiffs' being mixed together, and Holland had, in that case, carried it all off, could it have been said that the defendant was not liable? And, if he would have been liable in such a state of facts (as it seems clear he would), does it not follow by an application of the same principle that he must in the present case be liable for the 360 barrels, which were excluded from his notice, just as he would have been for the whole cargo in the case supposed?

The defendant further insisted that Haines was the plaintiffs' sub-agent, appointed by Cooke to take delivery of what the plaintiffs might be entitled to, and that he acquiesced in the mis-delivery to Holland. The evidence does not, in my judgment, warrant this assumption.

I regard Haines to have been employed merely to transfer the 610 barrels, or whatever portion of the cargo the captain thought fit to set apart as the goods of the plaintiffs, from the vessel to the cars, and there is no pretence for saying he had any authority to controvert or enquire into the accuracy of the captain's statement as to the jettison.

His assent to the delivery to Holland could have made no difference, even if he was shewn to have assumed any authority to act, which, however, the proof does not establish.

I think the appeal should be dismissed with costs.

PATTERSON, J.—One of the questions stated in the grounds of appeal was very properly abandoned by Mr. Robinson on the argument, as there can be no doubt that on the evidence and the authorities, it must be held that the contract to carry was a contract between the plaintiffs and the defendant, and not between the plaintiffs and Holland.

The remaining question is, whether the defendant delivered the plaintiffs' salt at Chicago, according to his contract.

The learned Judge, before whom the case was tried, without a jury, entered a verdict for the plaintiffs, for \$476, as value of over three hundred barrels of salt, which he found that the defendant had failed to deliver to the Chicago, Burlington, and Quincey Rail Road, and the Court of Queen's Bench refused to disturb that verdict.

I agree with the decision of the Court of Queen's Bench.

The cargo with which the defendant's vessel left Gode-rich consisted of 1,000 barrels of fine salt, belonging to the plaintiffs, and upwards of 2,400 barrels for one Holland. On the voyage, the deck load was jettisoned, comprising over three hundred barrels of Holland's salt, notwithstanding Holland received at Chicago his full number of barrels, that number being made up by the plaintiffs' salt, to the extent covered by the verdict. All the cargo which reached Chicago was, in fact, landed at a dock belonging to the railroad to whose charge the plaintiffs' salt was con-

signed for the purpose of being forwarded to Kansas. Of the plaintiffs' 1,000 barrels, 600 were loaded direct from the rail of the vessel on to the cars, and ten more which had been landed on the wharf were afterwards shipped in the cars; the rest were landed along with the barrels belonging to Holland, and were warehoused for Holland by the warehouseman who received his salt, or that part of his quantity which was warehoused; for 1,000 barrels of coarse salt, which formed part of Holland's portion of the cargo, and which were not to remain in Chicago, but were to be forwarded by the railroad, were, as I gather from the evidence, run from the vessel on to the cars, in the same way as the plaintiffs' 600.

The question is, whether under the evidence it ought to be held that all the salt belonging to the plaintiffs was delivered to the railroad.

It seems clear enough that all the salt which Holland received was delivered before or on 9th December. Costello, the foreman of the warehousemen, made an entry of the receipt of 1,431 barrels in store on 9th December, and it was in that lot that the plaintiffs' salt was included.

Costello says that the unloading of the vessel was completed on the 9th. I am satisfied that he is wrong in this, notwithstanding that the witness, Haines, gives the same date. I think the unloading was not completed till the 10th, as Mr. Throop gives the date.

The discrepancy is not remarkable, when it is considered that Haines, who made no entries, and who is associated with Costello, is more likely to speak from Costello's recollection than from his own; and that Costello, in naming the 9th, doubtless names the last day in which he was in any way concerned in the landing of the cargo.

Mr. Throop is the collector of customs, and was called by the defendant. He gives the 10th as the day when the unloading was finished, speaking, as I should infer, from some entry, and he is borne out by the facts that the receipt for the freight of the 610 barrels is dated on the 10th, and that the way-bill of the railroad for the 600 barrels, is dated on the 11th.

Seven facts seem to be established by either the direct evidence, or by reasonable inference from it.

1. It was well known to the captain that the plaintiffs' salt was to be forwarded by the railroad.

2. The mode of delivery of barrels to be forwarded, was by running them on a plank from the rail of the vessel to the cars.

3. Only 600 barrels of the plaintiffs' salt were delivered in this manner.

4. The 600 barrels were so delivered on the 10th December.

5. Before the 10th December, and before any of the plaintiffs' salt had been run on to the cars, there had been landed on the wharf, and received by Holland, the full number of barrels claimed by Holland, including enough of the plaintiffs' barrels to supply the place of those of Holland's which had been jettisoned, and apparently including ten more, which were left on the wharf, and were shipped on the 12th December on the cars.

6. The captain told Mr. Cooke, the railroad agent, that some 300 barrels of the plaintiffs' salt had been washed overboard, and so prevented Mr. Cooke from demanding the missing barrels.

7. It was not questioned between the captain and Mr. Cooke that the only salt delivered to the railroad was that which went on the cars.

In view of these facts, it is impossible to say that any other verdict should have been found. The only circumstance which has much force as an argument to the contrary, is the employment of Haines by Cooke.

He was employed, as Cooke says, "to receive and load the salt into the cars," and as he says himself, "to load the salt marked W. H. P. & Co. for Kansas City."

But, taking this in connection with the rest of the evidence, there seems no doubt that Haines was there on the part of the plaintiffs, only to receive for them and to load on the cars those barrels which were delivered to the railroad.

The fact that he was in the employ of the warehousemen who received Holland's salt, and that men in his employ, or under him, handled all the cargo, cannot in my judgment affect the question of the due performance by the captain of the contract to deliver, so as to alter the effect of the other evidence to which I have referred.

BURTON, J.—I concur in the opinion that this appeal should be dismissed, and the verdict in favor of the plaintiffs allowed to stand, on the short ground, that the salt was received by the defendant as a common carrier, to be carried and delivered for the plaintiffs, that the burden of showing such delivery was upon him, and that there is nothing in the evidence to shew such delivery, or to relieve him of the duty thus cast upon him.

It is not necessary to consider what would have been the effect of a delivery at the wharf without any appropriation, or attempt at appropriation by the captain, but leaving it to the parties interested, and who had notice of the arrival, to select their own goods, because in this case Cooke, who was acting for the railway, and may for this purpose be regarded as the plaintiffs' agent, was expressly informed on the arrival of the vessel that only 610 barrels of the plaintiffs' salt were on board, and that the rest of their salt had been jettisoned. To hold that he or Haines, the person he had engaged to receive delivery, were guilty of any breach of duty in neglecting to take possession of the remainder of the plaintiffs' salt, would be most unreasonable. They were mere passive agents to receive such property as the captain delivered to them as the property of the plaintiffs, and could have had no means of knowing that his statement was untrue; but there was a positive duty on the captain to deliver. He knew that Cooke was there to receive the plaintiffs' salt, and he delivered to him 610 barrels only, having previously informed him that that was the only salt on board belonging to the plaintiffs. It scarcely lies in his mouth to allege any breach of duty on Haines' part in the face of that representation, still less can

it be urged that a delivery to Haines, under such circumstances, was a delivery to or for the plaintiffs.

I see no reason whatever for disturbing the verdict.

Appeal dismissed (a).

JONES V. COWDEN ET AL.

29 Vic., ch. 24, sec. 57—Retrospective operation of tax sale. Registration of sheriff's deed. Evidence. Defects cured by statutes. The judgment of the Court of Queen's Bench, 34 U. C. R. 345, affirmed on appeal.

APPEAL from the judgment of the Court of Queen's Bench, reported ante 34 U. C. R. 345, and making absolute a rule *nisi* to enter a verdict for the plaintiff.

The action in the Court below was ejectment, brought for 190 acres, specially described, of lot 22 in the 1st concession of Manvers. The plaintiff, devisee under the will of George E. Jones, claimed under a tax sale by the late Sheriff Ruttan to William Sykes, on the 9th of July, 1839. The deed was made to Sykes on the 10th of July, 1840, and was registered on the 18th of July, 1861. It was registered on the certificate of a sheriff, given while he was out of office, and misrepresenting the territorial district of his shrievalty. Sykes mortgaged to George E. Jones, who acquired the land by foreclosure.

The defendant claimed, through several *mesne* conveyances, under a deed from Archibald Fraser to William Fraser, dated 12th of March, 1856, and registered 1st of August, 1857, Archibald Fraser deriving his title through several persons from the patentee.

December 17, 1874 (b). The appeal was argued by *S.*

(a) The Chief Justice read written judgments in this and the following case, which were mislaid before being handed to the reporter. He concurred in dismissing the appeals.—REP.

(b) Present—DRAPER, C. J. of Appeal; STRONG, J.; BURTON, J.; and BLAKE, V.C.

Richards, Q.C., and *Benson*, for the appellants, and by *Bethune* and *J. W. Kerr*, for the respondent.

The argument will sufficiently appear from the reasons of appeal given below, and from the argument in the Queen's Bench, fully set out in the report, 35 U. C. R. 347-352.

The reasons for the appeal were :

1. That the deed from Ruttan, sheriff, to Sykes was invalid, for these reasons :

There was no proper schedule returned by the Surveyor-General to support the sale for taxes. It was not shewn that the taxes for which the land was sold had ever been properly imposed by the Quarter Sessions: *Cotter v. Sutherland*, 18 C. P. 357. There was no sufficient evidence of proper advertisement of the lands for sale. It rests on a party relying on a sheriff's deed to establish its validity: *McMillan v. McDonald*, 26 U. C. R. 454, per Hagarty J.; *Paterson v. Todd*, 24 U. C. R. 296.

2. The defects in the sheriff's sale are not cured by 32 Vic. ch. 36, sec. 155, O.: *Hamilton v. Eggleton*, 22 C. P. 536; *Canada Permanent B. & S. Society v. Agnew*, 23 C. P. 200.

3. The defendants are entitled to prevail by virtue of the prior registration of their title. Sheriff's deeds for taxes were within the registry laws, and were required to be registered to preserve their priority: 6 George IV., ch. 7; *Doe d. Brennan v. O'Neil*, 4 U. C. R. 8; *Bruyere v. Knox*, 8 C. P. 520; *Waters v. Shade*, 2 Grant 457; *Doe d. Robinson v. Allsop*, 5 B. & A. 142; *Warburton v. Loveland*, 2 Dow & C. 480. See also *Bell v. McLean*, 18 C. P. 416; *Doe d. Russell v. Hodgkiss*, 5 U. C. R. 348; 9 Vic., ch. 34, sec. 6 (Registry Act).

4. There was no proper or sufficient registration of the sheriff's deeds to Sykes, either under the registry laws or to satisfy 29 Vic., ch. 24, sec. 57, or 31 Vic., ch. 20, sec. 59, O. The certificate given by Ruttan was void, and no registration could be founded upon it, because: 1. If given at the time of its date (1840) it was given by the sheriff of the "United Counties of Northumberland and Durham,"

which had then no existence, while the sale was made by the sheriff of the "Newcastle District." 2. If not given at the time of its date, the onus was cast on the plaintiff of shewing when it was given. 3. The evidence shews the certificate to have been given in 1861, long after Ruttan had ceased to be sheriff. 4. If made in 1861 (or at any time after 1st January, 1851), it could not be given by Ruttan, for 13-14 Vic., ch. 66, repealed 6 George IV., and gave no power to sheriffs to complete anything done under 6 Geo. IV. The statute 16 Vic., ch. 182, sec. 66, provided for the the registration of *deeds* given, notwithstanding the repeal of 6 George IV., but made no provision for giving certificates on which to register such deeds. The certificate was therefore given by Ruttan after the repeal of the Act authorizing him to give it, and was invalid: *McDonell et al. v. McDonald*, 24 U. C. R. 74; S. C. 24 U. C. R. 424, 425, per Draper, C. J.; *Bryant et al. v. Hill*, 23 U. C. R. 96; *McMillan v. McDonald*, 26 U. C. R. 454; *Doe d. Young v. Smith*, 1 U. C. R. 195.

If the certificate was given under Consol. Stat. U. C., ch. 55, sec. 151, or Consol. Stat. U. C., ch. 89, sec. 34, it should have been given by the then sheriff (Fortune). This Act conferred no power on a person not then sheriff.

The certificate was required to be under the "seal of office" of the sheriff, and therefore could not be given by a person out of office, and who consequently could not have a "seal of office."

The certificate being invalid, the registration of the sheriff's deed was invalid also: *Robson v. Waddell et al.*, 24 U. C. R. 574; *Jack d. Rennick v. Armstrong*, 1 Hud. & Br. App. 727; *Sullivan v. Walsh*, 1 Jones 264; *Harding v. Carry*, 10 Ir. C. L. Rep. 140; *Reid v. Whitehead*, 10 Grant 446, per Esten, V. C.

The registration in 1861 cannot avail the plaintiff as a registration under 29 Vic., ch. 24, sec. 57, or 31 Vic., ch 20, sec. 59, O.

The plaintiff's reasons in support of the judgment were :

1. That it was shewn that the taxes for which the land was sold were illegally imposed, but that in the absence of evidence to the contrary the Court shall assume that they were illegally imposed. See cases collected in *Cotter v. Sutherland*, 18 C. P. 395; *Errington v. Dumble*, 8 C. P. 65.

2. There was sufficient evidence of the publication of the advertisement of the sale for taxes, but the Court will presume that it was properly advertised, and in any event, even if not advertised for a sufficient length of time, it would not affect the sale: *Connor v. Douglas*, 15 Grant 456. That the defects, if any, in the sale were cured by the statute 32 Vic., ch. 36, sec. 155, O.: *Bank of Toronto v. Fanning*, 18 Grant 391, decided in reference to a similar statute.

3. That this statute was intended to cure all defects, except in cases of actual fraud, and should receive a large and liberal interpretation: Interpretation Act, 31 Vic., ch. 1, sec. 7, sub-sec. 39, O. *Hamilton v. Eggleton*, 22 C. P. 536, was not well decided, but consistently with that case this sale may properly be held to have been validated by the said statute, because the taxes for which this sale was had were due and in arrear.

4. The registration of the sheriff's deed in 1861 was a good registration, within the meaning of sec. 59 of the "Registration of Titles, Ontario Act," and sec. 57 of the Registration of Titles (Upper Canada) Act: *Magrath v. Todd*, 26 U. C. R. 87.

5. That if the sheriff's deed was not properly registered within the meaning of the said sections before the passing of the said statutes, then the deeds under which the defendant claims title were not properly registered, as they were not registered after the passing of the said statute.

6. That sec. 6 of ch. 17 of 36 Vic., O. has cured any defect in so far as the registration of the sheriff's deed is concerned.

7. That the defects, if any, in the said sale were cured by the statute 33 Vic., ch. 23, O.

STRONG, J. The land in question in this case, 190 acres, part of lot number 22, in the first concession of the township of Manvers, in the county of Durham, was sold for taxes in the month of July, 1839, and the sheriff's deed carrying out that sale was executed on the 10th of July, 1840. The land had been granted by the Crown, in 1817, to a Mrs. Hay, who died in 1828, and whose heir-at-law, Alexander Hay, on the 8th of May, 1855, conveyed the whole lot, containing 200 acres, to Archibald Fraser. This conveyance was registered on the 5th July, 1855. Archibald Fraser, on the 12th March, 1856, conveyed the land to the defendant William Fraser, who registered his deed on the 1st August, 1857.

The defendant Mrs. Cowden claims through her husband, under a contract of purchase entered into with William Fraser.

The sheriff's deed carrying out the sale for taxes, and under which the plaintiff claims, was not registered until 1861. This registration took place upon a certificate given by Mr. Ruttan, who, as sheriff, had made the sale for taxes, and which certificate was in conformity to the provisions of the several enactments, 6 Geo. IV, ch. 7, sec. 19; 16 Vic. ch. 182, sec. 66; Consol. Stat. U. C. ch. 89, sec. 34.

The certificate bears date the 10th of July, 1840, at which time Mr. Ruttan still continued to be sheriff of the late Newcastle district, but I have come to the conclusion that the evidence shews it not to have been actually issued until 1861, when Mr. Ruttan had ceased to fill the office of sheriff.

Several objections were taken to the validity of the sale, but I am of opinion that the plaintiff is entitled to be protected against these defects, assuming them to exist, under the provisions of the Acts 29-30 Vic. ch. 53, sec. 156, and 32 Vic. ch. 36, sec. 155 O., for there can be no question but that the sheriff did actually sell 190 acres, part of lot 22, the exact description of which was ascertained by the law, conformably to the provisions of 6 Geo. IV. ch. 7. There was, therefore, first a sale of this particular land, and subsequently a deed carrying out that sale.

The plaintiff, therefore, brings himself within the conditions of the statutes referred to, and this action was not commenced within the periods of limitation prescribed.

The decision of the case must therefore depend altogether on the registry laws, as applied to the facts stated.

I agree with the majority of the Court of Queen's Bench, in holding that prior to the Registry Act, 29 Vic. ch. 24, tax sale deeds were on no different footing from other deeds as regards the obligation to register, and that nothing in the 6 Geo. IV. ch. 7, makes any difference in that respect.

Up to 1851, when the statute 13-14 Vic. ch. 63, altered the law, a party was not bound to register in order to protect himself against the risk of having his deed avoided by the registration of a conveyance, by a subsequent purchaser in good faith and for value without notice, unless there had been some prior registration, or, as it is usually expressed, unless the title was a registered one.

Under the law brought into operation by the last-mentioned Act, all purchasers becoming such after 1851, whose deeds were unregistered, were liable to be defeated by the registration of a subsequent purchaser, without regard to the condition that the title should be on the registry.

This enactment comprised tax sale deeds. It had, however, no retrospective operation as to deeds executed before its date, and therefore, when on 5th July, 1855, the deed from Alexander Hay, the heir-at-law of the patentee of the Crown, which had been executed on the 8th May, 1855, was registered, it did not in any way affect the sheriff's deed of the 10th of July, 1840, which then remained unregistered.

If, therefore, the sheriff's deed is to be postponed, it can only be through the retroactive effect of the 57th section of the Registry Act, 29 Vic. ch. 24, which is in these words: "All deeds for lands sold for taxes or under process of law, before the passing of this Act, shall be registered within one year after the passing of this Act, otherwise the parties respectively claiming under any such sales shall not

be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration."

There are, I think, two answers to the contention which the defendants, found on this clause:—*First*, the retrospective construction claimed by the defendant ought not to prevail. *Secondly*, there was, as the Court below have decided, a registration of the sheriff's deed, under which the plaintiff claims, sufficient to bring the plaintiff within the protection of the section in question.

The scheme and object of the registry laws, as has been often said, and as is apparent from the consequences which follow from non-registration, are to protect those who purchase relying on the state of the registry. This is also demonstrated by the doctrine established at an early day after the passing of the first English Act, by Courts of Equity, that notice of a deed should, as regards a subsequent purchaser, be equivalent to its registration.

Then it is a well settled principle, in construing statutes, so to interpret them as not to make them retrospective, unless the language of the legislature imperatively requires such a course.

The rule undoubtedly is that which is well stated in the case of *Miller v. Salomons*, 7 Ex. 475, 546, that statutes are to be construed according to the ordinary meaning of the words used by the legislature.

But this rule is to be taken in connection with one equally binding, if not paramount to it, which requires "that a statute shall not be so construed as to operate retrospectively, or to take away a vested right, unless it contain either an enumeration of the cases in which it is to have such an operation, or words which can have no meaning unless such a construction is adopted." *Broom's Max.*, 3rd ed., p. 34.

And in *Moon v. Durdan*, 2 Ex. 22, the Court says of this principle, that "it is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless there is something on the face of the

enactment putting it beyond doubt that the Legislature meant it to operate retrospectively."

These references and quotations might be multiplied to any extent, for the same doctrine is found constantly repeated, both by Judges and text writers. The application of the rule is, that which alone can cause any doubt or difficulty.

Now, the section which is the object of consideration here does undoubtedly, in plain language, formulate a rule which must govern persons whose titles are dependent on deeds carrying into effect a sale which had been executed before the passing of the Act, and which had not previously been registered.

Such instruments, although giving a perfect title up to the date of the statute, and not being subject to be invalidated by subsequent registered purchasers, are, after the lapse of a year from the passing of the Act, subjected to all those consequences of non-registration which have always been attached to deeds coming within the registry laws, namely, they are liable to be avoided by subsequent purchasers, in good faith and for value, who may register.

Thus, unlike other unregistered deeds, to which the Registry Act did not apply at the time of their execution, tax title deeds, and deeds for land sold under execution, taken at a time when the title was not a registered one, are brought under the operation of the registry laws, and purchasers may henceforth, or at least after the expiration of a year, rely on registration as a protection against such instruments.

The Legislature were probably led to introduce this exceptional provision as regards sheriff's deeds, from the consideration that they were out of and collateral to the ordinary chain of title, and that therefore it was not unreasonable to give registered purchasers protection against them to an extent which was not thought warranted as regarded grantees to whom the title could be traced, and where possession of the title deeds would be some notice to purchasers.

But is the Court called upon to give the benefit of this enactment to a purchaser like the defendants' grantor in the present case, who registered his deed subsequent to the sheriff's deed, at a time when the title was not a registered one?

The Act defines the person for whose benefit this section is intended, as "a purchaser in good faith who may have acquired priority of registration."

These words are, in my judgment, satisfied by confining them to persons who shall purchase in good faith, and register their deeds subsequent to the Act. There is at all events nothing in this language imperatively requiring that the construction contended for by the defendant should prevail.

By construing the section in the way I have mentioned the Legislature may be considered as perfecting and amending the registry laws by bringing within their scope a class of instruments which otherwise would have been unaffected by them, but as still leaving the consequences of non-registration to be the same and to operate in favour of the same persons as those for whose protection these laws were originally designed—purchasers relying on the registry.

To attribute the other meaning to the Legislature would be to forfeit vested rights and transfer them to a party who had no meritorious claim to the protection of the Legislature. The party who at a time prior to 1851, and when the title was an unregistered one, had registered his deed, had certainly imposed an obligation on all who came after him; but he had acquired no claim to superior consideration, either from Courts or from the Legislature, over a party who, having acquired at an earlier date a title under a sheriff's deed, had thought fit not to register.

The registration by the purchaser under whom the defendants claim was a mere accident as regards the plaintiff, and cannot be considered in any degree as an act of diligence entitling him to favour.

Therefore, to take this estate from the plaintiff and give

it to the defendants because the plaintiff's author did not think fit to register, whilst the defendants' grantor did do so, both exercising a perfectly legal discretion in so abstaining and in so doing, would be to give to the Act of Parliament an operation quite as arbitrary as if the superiority of the defendants' title to the plaintiff's had been made to consist in the number of witnesses to his deed, or in any other purely accidental circumstance.

To attach a disability to the plaintiff's title, which she had the means of remedying within a year, by making it after that period subject to the registry laws, was one thing—this the Act clearly does; but to take away the vested title of the plaintiff and to give it to the defendants, and that not as the consequence of any act on the part of the plaintiff, or as a premium to the defendants for any superior diligence, but merely as a penalty on the plaintiff for remaining passive and inactive in a matter which could not affect the defendants was something entirely different, and would be to impose confiscation and forfeiture of the most violent kind for the benefit of a party who had no claim to favour.

This, I think, the Legislature could not have intended, and as I interpret its language no such construction is called for.

The words, "a purchaser in good faith who may acquire priority of registration," clearly include purchasers subsequent to the Act who may register, and to that class I think they must be confined.

I did not feel called upon to write more fully upon this point, as I have been permitted by my brother Burton to read his judgment, in which he enters into a very elaborate consideration of the questions, and in which I entirely agree, including his observations on the case of *Bell v. Walker*, 20 Grant. 558.

Had I not come to this conclusion I should have been prepared to have affirmed the judgment upon the grounds stated in the judgment just delivered by his Lordship the Chief Justice—that on which the Court below proceeded,

namely, that there was a sufficient registration of the sheriff's deed to bring it within the 57th section. There could have been no object in re-registering, subsequent to the Act, a deed already well registered.

And the case, in this aspect, must therefore depend on the sufficiency of the registration of the tax deed in 1861. The objection to this is that Mr. Ruttan had ceased to be sheriff when he gave the certificate, and I agree with Mr. Justice Wilson's view, that the result of the evidence is to establish this. The Act was purely ministerial, and one which, according to *Doe Tiffany v. Miller*, 6 U. C. R. 426, a sheriff out of office may perform to complete a public duty initiated whilst he was in office ; and I am unable to see that the words, "seal of office," point to any such important mode of authentication as to make them otherwise than directory. I therefore agree with the judgment of the Chief Justice on this point.

I think the appeal should be dismissed with costs.

BLAKE, V. C.—It is proved that at the time of the sale in question there were some taxes in arrear, and that a sale actually did take place. As the land to be sold was defined under the Acts then in force, it was not necessary to give evidence that the portion of land to be sold was by the sheriff actually set forth at the time of the sale, as was required in *Knaggs v. Ledyard*, 12 Grant. 320. The case is therefore brought within sec. 155 of 32 Vic., ch. 31, O., and so the sale is validated, notwithstanding that there may have been defects in the proceedings.

I am of opinion that it was competent for Mr. Ruttan to complete the act commenced by him when he gave the deed as sheriff.

I have come to the conclusion, not without much hesitation, that, under the authorities, the irregularities referred to are not sufficient to render invalid the registration relied on by the plaintiff.

I am of opinion that it was not incumbent on a tax purchaser to register under 6 Geo. IV., nor until 29 Vic.;

and that having registered in 1861, the plaintiff was not called upon to re-register under 29 Vic., ch. 24, sec. 57, in order to retain his priority.

The appeal should therefore be dismissed with costs.

BURTON, J.—I concur in the views expressed by the learned Chief Justice at the trial, that there was sufficient evidence of the land having been returned by the Surveyor-General as described for patent, and looking to the fact that the sale took place under the provisions of 6 Geo. IV., ch. 7, which provided and directed the mode in which the measurement in all such cases should be made, I think there is sufficient evidence of a sale, and of a deed executed in pursuance of such sale, to bring the case within the 155th section of the Assessment Act, and that it is consequently not open to the defendants to impeach the sheriff's deed by reason of any of the alleged irregularities which were urged against it at the trial, and renewed before us.

But it was further objected that the sheriff's deed should have been registered, although at the time of its execution the title was not a registered title, and that the deed from the heir of the patentee under which the defendants claim, having been first registered, was entitled to prevail.

The policy of the law at that time was to leave it entirely optional with parties to register or not as they thought proper, and so long as the title was not brought upon the registry, the owner ran no risk of his title being defeated by subsequent purchasers who might choose to register. It was not, I think, intended to alter this policy as regards sheriff's deeds, but to afford the means of registration in case registration became necessary in consequence of the title being at that time a registered title, or in case the purchaser preferred to hold under a registered title; and I am of opinion, therefore, that at the time of the passing of the new registry law, 29 Vic., ch. 24, which, for the first time, made it necessary in all cases to register, the tax deed was valid as against the subsequently registered deed.

Then was this title defeated by reason of his omission to register within the twelve months limited in that Act ?

As already remarked, previously to this statute it was optional with parties to register or not, but a change in the previous policy was inaugurated in the Act of 1865, rendering it incumbent upon all parties to register, so that the register should give complete information and supersede the necessity for looking further for deeds than in the register itself.

This being the policy of the law, it was but natural that deeds given at tax sales or under process of law should be brought within its operation, and they are consequently referred to in express terms—six months after the sale being given for the registration of the deed as regards future sales, and twelve months from the passing of the Act as to past deeds.

The words of the 57th section are : “All deeds for lands sold for taxes or under process of law before the passing of this Act, shall be registered within one year after the passing of this Act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration.”

It was strongly urged before us that the omission to register within the stipulated time not only exposed the tax purchaser to the risk to which all other parties, subsequently to that Act coming into operation, were exposed, of having their titles defeated by the registration by a subsequent purchaser in good faith, but of having his title forfeited in favour of a party who did not purchase in reliance on the registry laws, and had completed and registered his deed under a different state of the law.

If the words used by the Legislature are in themselves precise and unambiguous, indicating an intention on their part to take away a vested right, we must give effect to it, whatever may be the consequences; but such an indication should be so clear as to place it beyond doubt that the Legislature intended it so to operate, and that the language

used could have no meaning unless such a construction be adopted. If any doubt arises upon the words themselves, whilst leaning against a construction which would operate so unjustly, we should endeavour to solve the doubt by discovering the object which the Legislature had in view and intended to accomplish by its passage.

At the time of the passing of the Act the plaintiff had a good title, and it is for the defendants to make out that the statute is retrospective for the purpose of ousting him of that right; and, as remarked by Cresswell, J., in *Marsh v. Higgins*, 9 C. B. 551, "If there is any ambiguity in the language the defendants' argument fails."

The section in question refers to past sales and deeds executed to carry out such sales, but the defendants attempt to make it extend not only to such deeds but to past registrations. If the grammatical construction is such as to leave no doubt of its being intended to apply to such registrations, that construction must prevail, unless the context shews clearly that a different sense was intended; but the rule is subject to the condition that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the rest of the Act that that apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a part of it.

Now, the object and intention of the Legislature was to compel all parties for the future to register, if they wished to avoid being cut out by subsequent purchasers, and to render it unnecessary for such intended purchasers to look beyond the registry; and they extended the provisions of the law as to tax sales to past deeds, giving the parties interested a reasonable time to comply with its requirements before they should be brought within its operation.

I think, therefore, this particular section must be read so as to apply, as in all other cases within the Act, to subsequent purchasers who may register. The language of the 57th section does not seem to me necessarily to bear the interpretation sought to be put upon it, for we find

words almost identical used in the 56th section in a sense which clearly could not be intended to be retrospective. As to the deeds mentioned in that section, they are required to be registered within six months of the sale ; as in the case of past deeds, within twelve months of the passing of the Act, with the like penalty in both cases.

The object and general intention of the Legislature in passing the Act was to compel all parties, whether purchasing under process of law or otherwise, to register, so that intending purchasers might ascertain in the registry office the true state of the title, and that all parties neglecting so to register subjected themselves to the risk of having their titles defeated by subsequent purchasers for valuable consideration and without notice, who should gain priority over the former conveyance by the earlier registration of the subsequent deed.

That was the general intention of the Act, and the mischief which the Legislature intended to remedy was, to prevent parties having their titles defeated by secret conveyances, which they had no means of ascertaining through the registry books ; but could it have been intended to interfere with the rights of parties acquired previously to its passing, and to alter the relative positions of registered and unregistered owners under the former law ? It appears to me that by confining the operation of this section to subsequent purchasers, it brings it into harmony with the rest of the Act and the general scope and meaning of the registry law, and gives to the words full effect, without the unjust consequences which would result from the other construction.

But it is said that a period having been given within which to comply with the law, is to be taken as an indication of the intention of the Legislature to make it apply to past transactions, and some cases have been referred to in support of that view, which do not, in my opinion, militate against the construction which, I think, is the true one.

The case of *Fowler v. Chatterton*, 6 Bing. 258, is

frequently referred to in the text books as an authority for this construction, but it will be found on examination not to sustain the position. The learned Judge, it is true who delivered the judgment in that case, laid stress upon the circumstance that a time was given for it to go into operation, and that the party had not brought his action within that time; but that reasoning was fallacious. In two other cases, in one of which the decision was given by Lord Tenterden himself, the framer of the Act, it was held that the statute applied even though the actions were brought within the limited time, and obviously that would be so.

The question there really was, whether, when the cause came on to be tried, the Judge was to be governed in receiving the evidence by that which was then the law of the land. The language of the Act then in question was "That no acknowledgment, &c., by words only *shall be deemed* sufficient evidence of a new or continuing contract," necessarily referring to the time when the Judge is to determine whether the evidence tendered is sufficient or not.

The Court, therefore, could not escape from the inevitable conclusion that the section was intended to apply to all cases which came on for trial after it was in operation.

We have to consider what was the object of limiting a time within which tax purchasers should comply with the law. It would have been obviously unjust to make such a law operative against them immediately; they have twelve months to register. Are we to infer that the Legislature intended, without clear and express words to that effect, that the omission to do so should be attended with the penal consequences contended for; or is it not more reasonable to assume that they intended that the omission to comply after the prescribed time should be attended with like consequences as in the other cases to which the Act applies?

Nor do I think this decision at all conflicts with the judgment of the Court of Chancery in *Bell v. Walker*, 20 Grant 558, on the 66th section of the same Act.

The words there were: "No equitable lien, charge or interest affecting land, shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party."

To have held such claims valid would have been to assume the functions of a Legislature rather than a Court; and one of the learned Judges in that case refers to the salutary nature of the enactment and the obvious intention of the Legislature to extend the enactment to all such claims—a reason wholly wanting in the present case, in which the giving of a retrospective operation to the statute would be not only to deprive a party of an antecedent vested right, but to confer that interest upon another who did not purchase in reliance upon the registry laws, and whose case I humbly conceive does not come either within the letter or the spirit of the clause in question.

I am therefore of opinion that although this section refers to past deeds, it does not propose to deal with matters which had taken place previous to its passage, or to deprive a party of a vested right unless by omitting to register he should deceive subsequent purchasers.

If this be the true construction, as I think it is, it becomes unnecessary to consider the sufficiency of the registration of July, 1861.

I concur with the rest of the Court that the appeal should be dismissed.

Appeal dismissed (a).

(a) See note (a), page 495, *ante*.

EASTER TERM, 38 VICTORIA, 1875.

(May 17th to June 5th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C.J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

MCKENZIE ET AL. V. DEWAN ET AL.

Joint Stock Companies under C. S. C. ch. 63—Liability of stockholders—Payment of stock—Registration of certificate—Pleading—Departure.

The C. S. C. ch. 63, enacts that the stockholders of any company incorporated thereunder shall be “jointly and severally liable” for all debts and contracts made by the company. *Held*, nevertheless, that a creditor might sue one, or any number more than one, of the stockholders.

In an action by creditors of the company against five shareholders, the declaration, after setting out an unsatisfied judgment recovered by plaintiffs against the company, alleged that the defendants before the debt was contracted, and before this suit, were stockholders, and had not paid up their shares in full, whereby defendants became liable to pay said judgment.

Three of the defendants pleaded that they were not stockholders when the contracts in respect of which the notes were given were made, nor from thence until, nor at, the commencement of this suit. The plaintiffs replied that these three defendants were trustees of the company, and omitted to make the annual report required by the statute, whereupon they became individually liable for the debts of the company. *Held*, that the replication was a departure, in alleging a different ground of liability from that taken in the declaration, and a ground which applied only to three out of the five defendants; and that in this latter respect there was a misjoinder.

The second plea, by two of the defendants, alleged that within five years from the incorporation of the company they paid up their full shares, and before this suit, to wit, on the 1st October, 1873, a certificate to that effect was made &c., and was duly registered &c., “in the manner required by the statute in that behalf.” *Held*, following *pro formâ*, the decision of the C. P., in *McKenzie v. Kittridge*. 24 C. P. 1, that the plea was good, though not shewing that the certificate was registered before the debts on which the judgment was recovered were contracted.

This Court, however, did not agree with that decision, but considered, taking together secs. 33, 34, & 35, that to protect himself from liability a shareholder must register his certificate of payment; and that if registered within thirty days from the payment the exemption would relate back to the time of payment, but if not, would begin only with the registry.

The fifth replication to the second plea, was, that the defendants were original stockholders, that the whole capital stock had never been paid in, and that the debt in the declaration mentioned was contracted by the company before the payment in full of defendants' shares, and before registration of the certificate. *Held*, good; and that under sec. 33, a shareholder complying with the requirements is discharged from liability, though the full capital stock is not paid up.

Sixth replication: that the certificate of payment mentioned was not made and sworn to, nor registered within thirty days after such payment, as in the said plea alleged, in the manner by the said Act directed. *Held*, bad, for the plea did not allege a registration within thirty days, and if before the contracting of the debt it would discharge the defendants, though not within the thirty days.

Another defendant, O., pleaded that he had paid up his shares in full, and had made and registered a certificate as required by the Act, and had done the same in the time and after the manner required by the Act to free him from personal liability for the debts of the company. The third replication to it was the same as the fifth replication to the second plea, and was *Held*, good.

Held, also, that both pleas were improper in form, in pleading matter of law—that the certificate was duly registered, &c.—instead of alleging the facts, when it was registered or when he paid up in full, &c., which the jury could try.

The fourth replication to O.'s plea was similar to the sixth replication to the second plea. The defendant O. rejoined, on equitable grounds, that before the debt in the declaration mentioned was contracted, and before this suit, he had paid his shares in full, of which the plaintiffs had notice, and that he registered the certificate of payment as soon as he knew that it was required by the Act. *Held*, that the rejoinder was bad, as being a departure from the plea; but that otherwise it shewed a good answer on the merits.

DEMURRER. Declaration: that on the 15th of October, A. D. 1873, the plaintiffs, in the Court of Common Pleas for Ontario, recovered a judgment against the Strathroy Woollen Manufacturing Company, for \$12,744.21 damages, and \$66.75 for costs, and thereupon on the said 15th day of October, the plaintiffs caused to be issued out of the said Court, upon the said judgment, an execution against the said company, directed to the sheriff of the County of Middlesex, and which said execution, before the commencement of this suit, was by the said sheriff returned unsatisfied, and the said judgment is wholly unsatisfied: that the said Strathroy Woollen Manufacturing Company is a

manufacturing company duly incorporated under the provisions of the Consol. Stat., C. ch. 63, carrying on their operations in the town of Strathroy, in the County of Middlesex, and having a capital stock of \$75,000, in 750 shares of \$100 each, payable within twenty months after the 1st day of October, A. D. 1869, in calls not to exceed the rate of ten per cent. every two months after the said last mentioned date till paid up: that the said company was continued a joint stock company under the said Act, from the said month of October, A. D. 1869, until after the commencement of this suit: that the said judgment was not recovered for or in respect of a debt contracted by the said company with the plaintiffs, which was not to be paid within one year from the contracting thereof, and was recovered in respect of a certain debt due and owing by the said company to the plaintiffs, upon a certain promissory note dated the fifth day of May, A.D. 1873, made by the said company, whereby the said company, four months after the date thereof, promised to pay to one Alexander Robbs, or order, \$2,519.19, and the said Alexander Robbs endorsed the said note to the plaintiffs, but the said company did not pay the same; and, also, for a certain debt due, &c., upon a certain other promissory note, dated the 6th day of May, A. D. 1873, made by the said company, whereby the said company, four months after the date thereof, promised to pay to Alexander Robbs and A. F. Beatty, or order, \$8,202.46, and the said A. R. and A. F. B. endorsed the said last-mentioned note to the plaintiffs, but the said company did not pay the same; and, also, for a certain debt due, &c., upon a certain other promissory note, dated the 16th day of May, A. D. 1873, made by the said company, whereby the said company, three months after the date thereof, promised to pay to the plaintiffs \$859.97, but did not pay the same; and, also, for a certain debt due, &c., on a certain other promissory note, dated the 11th day of July, in the year last aforesaid, made by the said company, whereby the said company, one month

after the date thereof, promised to pay to the plaintiffs \$920.36, but did not pay the same: that the action in which the said judgment was recovered was brought and commenced against the said company within one year after the debt became due, and the defendants, before the said several debts were, and each of them was, contracted, and before this action was commenced, subscribed for, and became and were, and each of them was, at the commencement of this suit, stockholders of the said company, and the whole amount of the capital stock of the said company, fixed and limited as aforesaid, has not been paid in, nor has a certificate to that effect, signed and sworn to by a majority of the trustees of the said company, been registered in the registry office of the County of West Middlesex, being the county wherein the business of the said company has been or is carried on; neither have the defendants paid up the full amount of their shares in the capital stock of the said company, nor made nor registered a certificate to that effect, as prescribed by the said Act,—by means whereof, and by force of the statute in that behalf, an action hath accrued to the plaintiffs to demand from the defendants, as such stockholders as aforesaid, the amount of the said judgment so recovered by the plaintiffs against the said company.

First plea, by defendants, Dewan and Murray, and Johnston, that they were not, at the respective times when the debt in respect of which the promissory notes in the declaration mentioned were made, or any or either of them, were, contracted, or at any time from thence till the commencement of this suit, or at the commencement of this suit stockholders in the said company.

Second plea, by defendants, Dewan and Murray: that the debts in the declaration mentioned were not, nor were any or either of them, or any part thereof, debts due or owing to any of the labourers, servants, or apprentices of the said company, for service performed for the said company: that within the period of five years from the incorporation of the said company, they paid up their full shares in the

said company, and that thereafter, and before the commencement of this suit, to wit, on the 1st day of October, A. D. 1873, a certificate to that effect was made and drawn up, which certificate was signed and sworn to by a majority of the trustees of the said company, including the president, before the registrar of the West Riding of the said County of Middlesex, the same being the district or county wherein the business of the said company was then carried on, and was, on the said 1st day of October, A. D. 1873, duly registered in the registry office of the said West Riding of the said County of Middlesex, in manner prescribed by the statute in that behalf.

Third replication to the first plea: that the said defendants in that plea mentioned were trustees of the said company, and it became and was their duty annually, within twenty days from the 1st day of January in each year, to make a report signed by the chairman or president and a majority of the trustees, and verified by the oath of such chairman or president, or of the secretary, and to insert the same in some newspaper published nearest to the place where the business of the company was carried on, stating the amount of the capital stock of the company and the proportion thereof actually paid in, together with the amount of the existing debts of the company, and to enter and register the same in the Registry Office of the county where the business of the said company was so carried on. Yet the defendants in the plea mentioned wholly neglected to make, publish, or register such statement, and thereupon the said defendants in that plea mentioned became individually liable for all debts then or thereafter contracted by the said company.

Fifth replication to the second plea: that the said last-named defendants were original stockholders in the said company, as in the said second replication to the first plea mentioned, and that the whole amount of the capital stock so fixed and limited as aforesaid has never been paid in, and that the said debt in the declaration mentioned was contracted by the company before the alleged payment by

the defendants of their full shares in the company, and before the registration of such certificate as in that plea alleged.

Sixth replication to the second plea: that the certificate of payment in that plea mentioned was not made and sworn to, nor was the same registered within thirty days after such payment, as in the said plea alleged, in the manner by the said Act directed.

Demurrer by Dewan, Murray, and Johnston to the third replication to the said first plea, on the grounds, that the said third replication is a departure from the declaration, inasmuch as the plaintiffs' alleged cause of action is by the declaration founded upon the liability of the said defendants as stockholders of the said company, by reason of the non-payment of the capital stock of the company, and the non-registration of the statutory certificate thereof, while the said third replication sets up another and different cause of action, that is to say, a liability of the said defendants as trustees by reason of their alleged non-compliance as trustees with certain of the provisions of the Act under which the said company was formed.

Demurrer by the same defendants to the fifth replication, on the grounds, that it was unnecessary, in order to relieve the said defendants from individual liability for the debts of the said company, that the whole amount of the capital stock thereof should be paid in: that payment by the defendants of their full shares in the company, and the registration of the statutory certificate thereof, were sufficient to relieve the said defendants from individual liability for the debts of the company, although such debts were contracted before such payment was made and certificate registered.

Demurrer by the same defendants to the sixth replication, on the grounds, that it was not necessary that the certificate in the said second plea mentioned should be registered within thirty days after the payment alleged in the said plea.

Joinder.

The plaintiffs also excepted to the first plea, on the grounds that the traverse was too large, and that it took or tendered an immaterial issue, to wit, the fact that the defendants were stockholders at the time of the commencement of this suit.

And, to the second plea, because it is not alleged or shewn that the certificate was registered before the debts were contracted, or within the time limited by the Act.

Seventh plea, by the defendant George Orchard: that he has paid up the full amount of all his shares in the capital stock of the said Strathroy Woollen Manufacturing Company, and has made and registered a certificate to that effect in the registry office of the county where the business of the said company has been carried on, as prescribed by the Act under which the said company was incorporated, and that he has done the same in the time and after the manner required by the said Act, to free him from all personal liability from the debts or contracts of the said company.

Replication to the seventh plea of the defendant, George Orchard: that the defendant, G. O., was an original stockholder in the said company, as in the said second replication to the fourth plea mentioned, and that the whole amount of the capital stock, so fixed and limited as aforesaid, has never been paid in, and that the said debt in the declaration mentioned was contracted by the company before the alleged payment by the said defendant G. O., of his full share in the company, and before the registration of such certificate in that plea alleged.

Further replication to the said seventh plea: that the certificate of payment in that plea mentioned was not made and sworn to, nor was the same registered, within thirty days after such payment, as in the said plea alleged, in the manner by the said Act directed.

Rejoinder by the said G. O., on equitable grounds to the plaintiffs' third and fourth replications to the seventh plea: that long before the commencement of this action, and before the contracting of the debts,

or either of them, by the Strathroy Woollen Manufacturing Company, in the plaintiffs' declaration alleged, the said defendant had paid up in full all his shares in the said company, and the plaintiffs were at such time, and at the time of the contracting of the said debts by the company, and from thence to the present time, well aware that the defendant had paid up the full amount of such shares, and the said plaintiffs had notice thereof, and the said defendant, so soon as he knew that the certificate of payment of stock was required to be registered, duly made and registered the same, in manner and form as required by the said Act, under which the said company was incorporated, according to the true intent and meaning thereof, to free him from all personal liability for the debts of the said company.

Demurrer to the defendant G. O.'s rejoinder on equitable grounds to the plaintiffs' third and fourth replications, on the ground, that the payment without registration does not release a shareholder from responsibility.

Joinder.

The demurrers were argued in Easter Term, May 27, 1874.

Burton, Q. C., and *Robertson*, Q. C., for plaintiffs. The five defendants were rightly joined, because the statute makes them jointly and severally liable. The original projectors of the company are liable for all the debts of the company, as general partners, until the whole stock is paid up: *Patterson v. Holland*, 7 Grant, 1, 10. If the original shareholders sell their stock, the purchaser is liable only to the amount of the unpaid stock: *Consol. Stat. C.*, ch. 63, secs. 33, 34. The third replication to the first plea is not a departure from the declaration: *Prince v. Brunatte*, 1 Bing. N. C., 435; *Lush v. Russell*, 5 Ex. 203; *Rixon v. Emary*, L. R. 3 C. P. 546; *Richards v. Hodges*, 2 Wms. Saund. 279, note (e), last ed., *Goram v. Sweeting*, 2 Wms. Saund. 550, 615, last ed.

The second plea, to which the plaintiffs have replied by their fifth and sixth replications, raises the question whether

the defendants are not still liable for the debts of the company generally, although they have paid up their stock in full. By section 36, the shareholders remain liable for the debts of the company for two years after parting with their stock. The sixth replication, that the certificate of payment of the stock was not made or sworn to, nor registered, within thirty days after payment, is supported by secs. 33 and 35. And if the defendants have not conformed to the Act in these respects, they are still liable, notwithstanding their payment.

The only question as to Orchard's pleading arises upon his equitable rejoinder. The plaintiffs contend that the alleged equity set up is of no avail against the express enactments of the statute.

Harrison, Q. C., for Orchard. The Consol. Stat. C. ch. 63, should be read with the 27-28 Vic., ch. 23, as relating very much to the same subjects. There is no provision in the Act that the original shareholders are to be liable after they have transferred their stock. The person who is liable must be a shareholder. As to the joinder of five persons out of a body consisting of them and of many others, *Thompson v. Hakewill*, 19 C. B. N.S. 713; *B. & L. Prec.*, 3rd ed. 471; *Corporation of Essex v. Bullock*, 11 C. P. 323, shew there is no right to sue these defendants out of a greater number, and it appears there is a greater number than those who are sued. It is unnecessary for this defendant to argue that registration is not required to protect him if he has paid his stock, because the defence he relies upon is an equitable one, that the plaintiffs had knowledge of his having paid up his subscription in full before the debts recovered for by the plaintiffs were contracted, and that is an answer so far as he is concerned.

Meredith, for the other defendants. In *McKenzie v. Kittridge*, 24 C. P. 1, the Court of Common Pleas decided that a shareholder who had paid his stock in full after the plaintiffs' debt was contracted, was not liable for the debts of the company, although the full capital of the company had not been paid in. Section

33 discharges the individual shareholder on payment of his stock, and on registration of such payment, in like manner as the general body of shareholders are discharged by the 34th section, when the whole amount of the capital has been paid up. The third replication is a departure, for the reason specially assigned.

Burton, Q.C., in reply. The replications in this case shew the defendants were original shareholders, and that allegation was made to avoid what was said by the Common Pleas in the case before mentioned. The expression *shareholder* in the Act means an original shareholder, while *stockholder* is a transferee of the shareholder. By sec. 36, a person sued for the debts of the company, under the Act, need not be a shareholder at the time of the suit brought; see also sec. 38, which explains the liability of these defendants, although that section applies to a different subject than that which affects the parties in this suit. On the subject of departure, he referred to *Brine v. Great Western R. W. Co.*, 2 B. & S. 402.

June 19, 1875.—WILSON, J., delivered the judgment of the Court.

The first question is, whether these five defendants may be selected out of a greater number of co-shareholders in this company, and be joined together as co-defendants in this action.

The statute Consol. Stat. C. ch. 63, says the stockholders "shall be jointly and severally liable for all debts and contracts made by the company," secs. 34, 36.

Under the English Act 7 Geo. IV., ch. 46, sec. 13, it was provided that execution upon a judgment obtained against the public officer of the corporation, "may be issued against any member or members for the time being;" and under that enactment it was decided that a *sci. fa.* might issue against any one or more of the members for the purpose of having execution, and that the defendants proceeded against could not plead in abatement the non-joinder of the others, for the effect of the statute was to take away the plea in such

a case, because a remedy was given not only against persons who were members at the time of making the contract, but against those who were members while the judgment was in force, and because those who were sued and were made to pay the debt, were entitled to indemnity against the partnership, or by contribution from the co-members, if the company were insolvent: *Fowler v. Rickerby*, 2 M. & G., 760.

And in *Nunn v. Loxer*, 3 Ex. 471, Parke B. said, at p. 475: "I entertain no doubt whatever on the matter, that, according to the true meaning of the Act, the plaintiff is not bound to proceed against one or all of those members, but that he may select any number he pleases. He may have concurrent writs going on at the same time."

The remedy given by the statute is different from that given by the common law against partners. The words of the Act are, any member *or members* for the time being.

Our statute is differently worded: the stockholders are *jointly and severally liable*. These words, in ordinary cases, mean that all must be proceeded against in the one suit who are liable, or each one separately in his suit.

In a joint and several liability against two, the two may be sued in the one action, or each of the two in a separate action. If the joint and several liability be against three, two of the number cannot (unless on the death, &c., of the third) be proceeded against in the one action, for suing two out of three is a proceeding which is neither joint nor several.

Those who are liable to the debts and contracts of the company are the stockholders, and, as it is contended, those also who are not, that is, have ceased to be, stockholders, so long as they are sued within two years from the time they have transferred their shares: sec. 36. Giving the statute the construction contended for by the defendants in this respect would not be beneficial to the creditors of the company, if they had to sue the whole body of persons liable—that is, all the shareholders for the time being, and all those who had been, but had not ceased to be members for two years.

There would be great difficulty experienced in finding out those who had ceased to be members, and whether they had so ceased for two years or not; and also great difficulty in pleading with each one who was sued, and in establishing whether he had paid in full or not, or whether the plaintiff had notice or knowledge of such payment, although there was no registration made of it; and difficulties in other respects in cases of death and insolvency.

And if the creditor sued all of them severally, it would be a monstrous expense, and an abuse of the law. And if he sued only one, that one might be unable to pay. It is therefore better we should hold, in accordance with the English decisions, that the creditor may sue one, or any number more than one, and that he should not be obliged to sue the whole, although our statute is not so plainly worded as the English Act is to warrant such a decision.

The statute does not profess to be based upon the common law, as is remarked in one of the cases above mentioned, for persons are made liable who were not members when the debt was contracted; and we best give effect to it by holding that this action is rightly constituted as to parties, for the defendants will unquestionably be entitled to contribution from those who are equally liable with them; and it is better they should recompense themselves in that way, than compel the creditors in every case to try to effect that by joining the whole body of members in the action.

The next question is, whether there is a departure in the third replication from the declaration.

The declaration charges that "the defendants, before the debts were contracted, and before the commencement of this action, subscribed for, and became, and were, and each of them was, at the commencement of this suit, stockholders of the company, and the whole amount of the capital stock of the company, fixed and limited, has not been paid in, &c., neither have the defendants paid up the full amount of their share in the capital stock of the company, &c., by means whereof the defendants became liable

to pay the plaintiffs the amount of the said judgment, according to the statute."

The third replication says that the defendants, who pleaded the first plea, "were trustees of the company, and it was their duty annually, within twenty days from the first of January in each year, to make a report, signed, &c. Yet the defendants wholly neglected to make, publish, or register such statement, and thereupon the defendants became individually liable for all the debts then or thereafter contracted by the company."

The declaration charges the ordinary liability of stockholders against the defendants—namely, the non-payment of the capital stock of the company, and the non-payment by the defendants of their special subscriptions or engagements—as a reason why they should pay the plaintiffs their demand.

The replication forsakes that ground altogether. It places the defendants' liability, not upon the non-payment up of the capital of the company, nor upon the non-payment of their individual shares, but upon the non-compliance, by the trustees of the company, the defendants being averred to be such trustees, under sections 47 and 48, and who, as *trustees*, are by the 49th section made jointly and severally liable "for all the debts of the company then existing, and for all contracted until such report be made."

It is only three of the five defendants who plead the first plea, to which the third replication is pleaded, and these three as alleged were trustees; the other two are not shewn to have been or to be trustees.

There is a misjoinder in this respect. The two are liable on one ground; the three on another ground, with or for which the two are in no way interested or connected, inasmuch as the three are made responsible as trustees for their individual default.

The three are made liable, too, for *all* debts then or thereafter to be contracted until the report is made. That is not the liability of the two; and as the three are liable for *all* the debts of the company, they are liable to those

as the trustees, for which the two who are not trustees are, by the 36th section, not liable, which are mentioned in that section.

It appears to me, also, that the report required to be made and published, &c., by the trustees, must be made and published notwithstanding the whole capital stock of the company has been paid in, and a certificate sworn to of that fact and duly registered.

While it is plain, that, in such a case, an ordinary stockholder is not answerable for any debt whatever of the company, unless it may be for services rendered by labourers, servants, and apprentices, for which this action is not brought, the three, as *trustees*, are liable for the very debts excepted in the declaration, that is, for debts which were not sued within a year after they became due, and also for debts which were not to be paid within a year.

All these facts shew that the plaintiffs have, in their third replication to the first plea of the three defendants, wholly shifted their ground from that which they had taken in the declaration; and, by doing so, they have rendered it impossible to prosecute these three conjointly with the other two who are not trustees.

The third replication to the first plea is therefore bad. And it is probable, if it remain on the record, that there should be a general judgment for all the defendants, because of the plain misjoinder, which, for the reasons stated, now appears on the pleadings.

The next question is, whether the second plea is a good defence? It states that the defendants pleading it, within five years from the incorporation of the company, paid up their full shares in the company, and before the commencement of this suit a certificate to that effect was made, &c., and was duly registered at prescribed by the statute.

It is said the plea is bad, because it does not shew a registration of the certificate before the debts sued for were contracted, or within the time limited by the Act.

The 33rd section says: "Any shareholder in a company may, at any time within a period of five years from the

incorporation of the company, pay up his full shares in the company, and a certificate to that effect shall be made and registered as prescribed in the thirty-fifth section of this Act, after which such shareholder shall not, except as hereinafter mentioned, be in any manner liable for or charged with the payment of any debt or demand due by the company beyond the amount of his share or shares in the capital stock of the company so paid as aforesaid."

The 35th section requires the company, within thirty days after payment of the last instalment of the capital of the company, to get a certificate to that effect signed, &c., to be registered "within the said thirty days," &c.

And the plaintiffs allege that the second plea does not shew the certificate, to which the 33rd section refers, was registered within thirty days after the last payment of stock was made by the defendants.

The meaning of the 35th section, as to registering the certificate so far as an individual stockholder is concerned, it appears to me, is explained by the 34th section, which enacts that until the whole capital of the company is paid in, and the certificate to that effect has been made and registered, the stockholders of the company shall be jointly and severally liable for the debts.

Whenever, therefore, the certificate under the 35th section is registered, even although after the expiration of the thirty days, the stockholders are no longer liable.

Applying that to the 33rd section, to which the second plea relates, the certificates of the defendants' payment of their stock, if registered within the thirty days (assuming the thirty days to apply to them), will protect them from the debts of the company from the time of their payment, but if the certificates be not registered within the thirty days, the defendants will not be protected until the certificates have been registered.

The plea alleges that after the payment was made by the defendants, and before this suit, *to wit*, on the 1st of October, 1873, a certificate was signed, &c.; so far the time is not material; then it proceeds, and which certificate was on the said 1st of October, 1873, duly registered.

The last date is material. It does not shew by any means the registration was made within thirty days after the time of the last payment of stock by the defendants, for we do not know when that was done, excepting that it was within five years after the incorporation of the company.

We do know, however, the registration of the certificate by the defendants was on the 1st of October, 1873, and that this action was not begun until the 11th of December, 1873. The registration was good on and from the time it was made.

But the plaintiffs say the plea is still bad, because it does not shew the certificate was registered before the debts were contracted. It does not shew that by averment, The dates on the pleadings shew the certificate was not registered until after the notes were made by the company, and until after they had all become due.

Should, then, the certificate have been registered by the defendants to protect them from liability in this suit before the debts, upon which the judgment was recovered, were contracted? It appears to me it should have been. And as the pleadings shew, in fact, it was not registered before the debts referred to were contracted by the company, the stockholders who had paid up in full before the debts were contracted, but who had not registered the certificates of such payment until after that time, remain liable for the same, although the certificates were duly registered before this action was brought, or even before the action was brought upon such debts against the company.

The decision in the Common Pleas is directly the other way on this point, and that being so, although not agreeing with it, I shall follow it.

Then as to the fifth replication to the second plea. It alleges the defendants were original stockholders, that the whole capital stock has never been paid in, and that the debts in the declaration mentioned were contracted by

the company before the alleged payment by the defendants of their full shares, and before the registration of such certificate.

We do not see any distinction in the statute between original and derivative shareholders, nor do we know of any difference between a shareholder and a stockholder.

If the plea before mentioned is bad, as we have just determined, because it appeared the debts were contracted before the certificate of the payment of the defendants' shares was registered, the replication must be sufficient so far as it alleges that fact, and, *a fortiori*, it must be sufficient when it also alleges that the payment of the stock was not made until after the contracting of the debts.

The only part of the replication remaining to be considered, is that part of it which alleges that the whole capital stock of the company has never been paid in. Why that fact was repeated in the replication, when it was contained in the declaration, is not very clear. A statement once well made, is often enough made.

The plaintiffs, if they thought that a material averment, might have demurred to the plea at once, because it does not state matter which overreached, or covered, or met that averment. The argument upon that allegation is, that however many of the shareholders have paid up their stock in full, and duly registered the certificate thereof, they are not and never can be discharged from the debts of the company until the whole of the stock of the company is paid up, and a certificate of that fact registered by the company.

The original enactment, 13-14 Vic., ch. 28, sec. 11, was to that effect.

The 16 Vic., ch. 172, sec. 2, altered that, and enacted that the individual shareholder, who paid up within five years from the incorporation of the company, and registered the certificate thereof, should be in the same position as to "his liability, in virtue of the said Act [the 13-14 Vic., ch. 28], and shall have the same force and effect from the making thereof, as the making and registering of the certificate

of the payment of the whole amount of the capital of such company."

The 33rd and 34th sections of the consolidated Act do not fully, and perhaps do not rightly, express the meaning of the original enactments. But we do not doubt that the 33rd section must be given its natural and plain meaning,—that the individual shareholder shall, on compliance with the provisions of that enactment, be discharged from all the debts of, or liabilities for, the company, although the full capital stock is not paid up; and that the 34th section must be so qualified as to make it apply only to those stockholders "who shall not have paid up their shares, according to the terms of the 33rd section." We agree fully with the judgment of the Court of Common Pleas on this part of the case.

There must be judgment for the plaintiffs upon this replication.

As to the sixth replication, it traverses that the certificate was registered within thirty days after payment by the defendants of their stock, "as in the said plea alleged, in the manner by the said Act directed."

The plea does not say the certificate was registered within thirty days, but that it was "duly registered in the Registry Office, in manner prescribed by the statute in that behalf."

That is an improper mode of pleading, for, if a jury try the issue, they cannot say whether it was or was not duly registered in the manner prescribed by the statute. That is a matter of law which they are not to try. It is submitting to them a question of law instead of a matter of fact. They can try whether it was registered within thirty days, for that is a fact and not a matter of law.

But the defendants have not said the registration was within thirty days. They want to get the benefit of it if the Act mean that, and not to commit themselves if the Act does not mean it.

If the plea mean that, the replication is good, for it traverses it. If it do not mean that, and if the statute do

not require it, the replication does not contain a good traverse.

In my opinion, the registration is good, as already stated, if made at any time. If made within thirty days after the payment, the exemption of the shareholders relates back to the day of payment. If it be not made till after the thirty days, the exemption does not begin till the time of registration. I think the thirty days do apply to the shareholders' registration, as well to that of the company, in that way.

The plea must be construed as meaning that the registration was made so as to discharge the defendants from personal liability, that is, before the contracting of the debts, even although the registration was not within the thirty days; and, therefore, the replication traverses that which is not alleged nor necessarily implied, and which is not a material allegation.

Here, it is of no consequence, except as to the trifling costs of the issue, for the fact of registration, as before stated, was made long after the debts were contracted. The replication, however, is objectionable, for the reason stated.

There will be judgment for the defendants against the sixth replication.

The defendant, Orchard, has pleaded that he has paid up the full amount of his shares in the stock of the company, and has made and registered a certificate to that effect in the registry office, as prescribed by the Act, and that he has done the same in the time and after the manner required by the Act, to free him from all personal liability from the debts or contracts of the company.

This plea is subject to the same objection of pleading matters of law, which a jury may have to try, instead of matters of fact, which they can try. The plaintiffs' third replication to it is in like form as their fifth replication to the other defendants' second plea, and which fifth replication we have held to be sufficient, because containing a sufficient answer in substance, although there is, in one

part of it, an averment which we think is not material. We must hold this third replication good for the same cause.

The fourth replication to this plea of Orchard's, is the same as the sixth replication to the second plea of the other defendants, which we have thought to be insufficient. There is no demurrer to it. The question between these parties turns really on the equitable rejoinder.

It alleges that before this suit, and before the contracting of the debts in the declaration mentioned, the defendant had paid up in full all his shares, and the plaintiffs were at such time, and at the time of the contracting of the debts by the company, and from thence to this time, well aware the defendant had paid up the full amount of his shares, and the plaintiffs had notice and knowledge thereof, and the defendant, so soon as he knew the certificate of payment of stock was required to be registered, duly registered the same as required by the Act.

The plaintiffs say this rejoinder is no answer, for payment without registration of the certificate, is no release to the shareholder.

So we have just held on the ordinary legal pleadings.

The question presented to us by the parties, was whether the equitable defence of knowledge and notice by the plaintiffs of the payment by the defendant of his stock, before the debts of the company, was a good answer to the declaration. There is a preliminary question to be considered, which the parties did not touch upon, and that is whether the equitable rejoinder is not a complete departure from the plea?

We think it is. The plea sets up a full and strict compliance with the statute in all respects. It is very defective. It does not say when the stock was paid,—whether before or after the debts were contracted,—nor whether within five years after the incorporation of the company; nor when the defendant registered the certificate, whether before or after the debts were contracted by the company; but he plainly contends that all that shall be

inferred, without any other averment than what may arise from his very general language, that he did everything as prescribed by the Act, and in the time and after the manner required by the Act to free him from all personal liability.

In this fashion he sets up a full and effectual performance at law of everything to relieve him from personal liability.

In his rejoinder he says he has not complied with the Act, because he did not register the certificate in time; but nevertheless, the plaintiffs should not be allowed to benefit by that omission, because they have sustained no injury in consequence of such omission, inasmuch as they had in truth knowledge at the time of the company contracting the debts, and ever since then, that the defendant had paid up his stock in full; and so they could not in fact, nor in equity, have relied upon his stock as being any guarantee for their debt, or any fund from which they should be paid.

That is a manifest departure, and although it is an equitable pleading: *Thames Iron Works and Ship-building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358.

As to the substance of the rejoinder, we think, if it alleged or can be construed as alleging a payment within five years after the incorporation of the company, that it shews a good defence on the merits.

If actual notice of an unregistered claim to land will protect the claim against a registered title, where the latter had such notice before his purchase was complete, the like rule should apply to this case, where the plaintiffs had actual knowledge at the time the debt was contracted by the company, and, as I may presume, before the plaintiffs had become creditors of the company, that the defendant Orchard had paid up his stock, and was thereby discharged from all personal liability in equity as against him; and that he would be discharged as against every present personal liability, so soon as he completed the ceremonial act of registering a certificate of such payment.

The registration is for the purpose of giving general notice to every one. The party is then protected at law. But special actual notice to a particular person, of the substantial right and cause of exemption from liability, should be held to apply here with the full force of notice in other cases of the like kind. And we are of opinion the rejoinder is in itself, apart from the objection of departure, which cannot be passed over, a valid defence to the action: *Forrester v. Campbell*, 17 Grant 379; *Chadwick v. Turner*, L. R. 1, Ch. 310; *Bell v. Walker*, 20 Grant 558.

The judgment will therefore be as follows:—

For such of the defendants who have pleaded the first plea on the demurrers to the second and third replications.

And for the defendants who have pleaded the second plea, on the demurrer to the sixth replication; and also that the second plea is sufficient in law against the exceptions taken to the same.

And for the plaintiffs on the demurrer to the fifth replication to the second plea, and on the demurrer to the equitable rejoinder of the defendant Orchard.

Judgment accordingly (a).

(a) The decision in the Common Pleas, has been appealed from, and stands for judgment in the Court of Appeal.

SCROGGIE ET AL. V. THE CORPORATION OF THE TOWN OF GUELPH.

Town corporation—Drains—injury by overflow—Gratings in side-walk.

The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into the plaintiffs' cellar, and damaged their goods there.

The jury found, upon the evidence set out in the case, and which was held by the Court to warrant their finding, that the defendants had reason to believe the drains might be choked, and remained negligently ignorant of their condition; and a verdict for the plaintiffs was therefore sustained.

There were gratings and trap-doors in the side-walk opening into the cellars of one P., whose premises adjoined the plaintiffs, and which the jury found had been placed there many years before without defendants' permission. *Seemle*, that if the water had got into the plaintiffs' premises through the plaintiffs' own gratings, defendants would not have been liable; but that as between them and the plaintiffs they were responsible, as they would be if any one had been injured by such gratings, though the person who placed them there might be liable also.

DECLARATION. First count: that the defendants had constructed and maintained certain drains and sewers in the town of Guelph for the purpose of receiving and carrying away the water on and flowing from the streets of the town, and the drainage from the houses adjoining the streets; and the defendants, by their negligence, suffered the drains and sewers to be out of repair, and to be choked and stopped up; by reason whereof the waters and drainage received into the same overflowed therefrom upon the streets and sidewalks, and ran from thence into the cellar of the plaintiffs adjoining one of the said streets, and carried dirt and filth into the cellar and damaged and destroyed the plaintiffs' goods which were in the cellar, and injured the walls and floor of the cellar.

Second count, setting up negligence in the construction and management of the said drains.

Third count, setting up negligence in the alteration of the drains, whereby largely increased volumes of water, filth, &c., were brought into the drains without provision for carrying the same away.

Plea, not guilty.

This cause was first tried at the Guelph Fall Assizes of 1873, when a verdict was given for the plaintiffs, and damages were assessed at \$317.47.

A new trial, on the application of the defendants, was granted by the Court, more especially for the purpose of shewing on a further trial whether the defendants had any knowledge of the drains being choked up until the injury to the plaintiffs happened; or whether the defendants should have supposed the drains were not in good condition before that time, and neglected to attend to them; and also, by whose act or by whose authority the gratings in the sidewalks were constructed; and whether the town authorities gave any leave to make them, either expressly or by implication.

The cause came on again for trial at the last Fall Assizes at Guelph, before Galt, J., when the like verdict was returned.

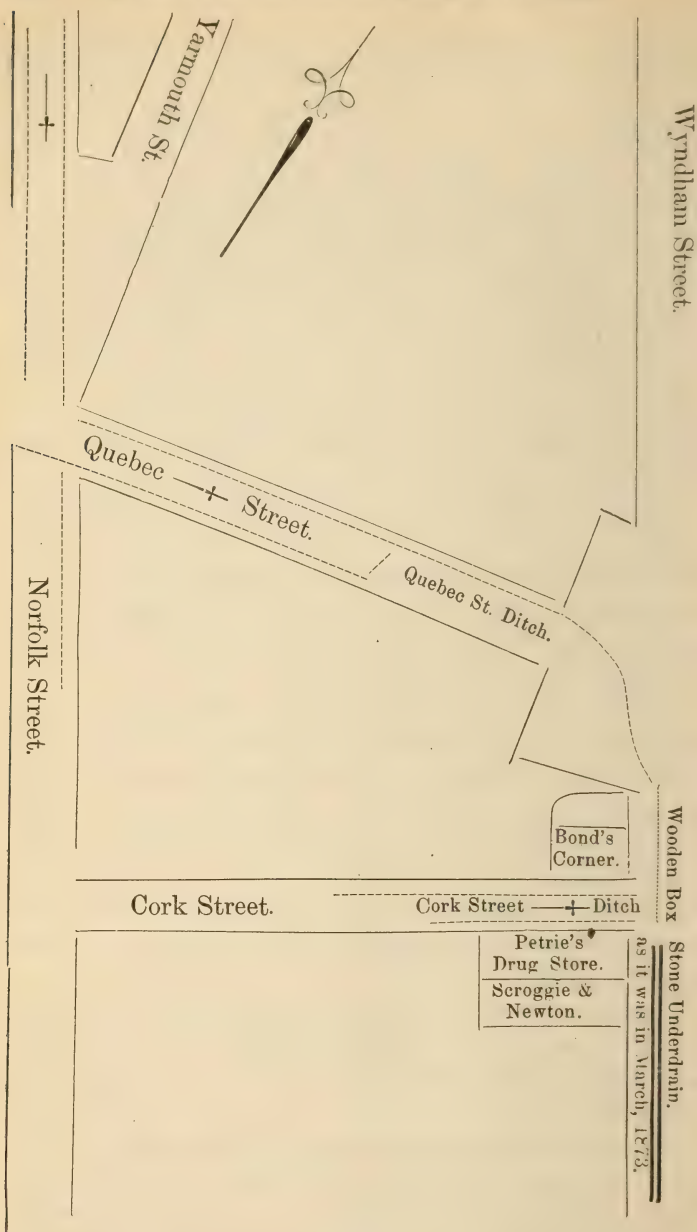
The evidence shewed that Cork street ran in a course nearly east and west, and Wyndham street at right angles with it; that Petrie's store was on the south side of Cork street, and at the corner of Cork and Wyndham streets, and the plaintiffs' store was south of Petrie's, and fronting on Wyndham street.

Quebec street, to the north of Cork street, coming from the west in a diagonal direction, joined Wyndham street a little to the north of the intersection of Cork and Wyndham streets; and Bond's corner was on the north side of Cork street, at the corner of Cork and Wyndham streets, exactly opposite to Petrie's store.

There was a surface drain on Wyndham street, about six or seven inches lower than the sidewalk in front of the plaintiffs' premises.

There was a box drain from Bond's corner, on the north of Cork street, across to Petrie's corner on the south of Cork street, a surface drain or culvert over which the road was made.

There was an open surface drain on the north side of Cork street, which joined the box drain or culvert at Bond's corner. The Cork street drain, for about eight feet from the box drain, was covered, and there was a coping on that covering.



The full lines denote the Stone Underdrain as it was in March, 1873 ;
the open dotted lines the Open Ditches discharging into William Street ;
the close dotted lines represent the Box Drain.

There was a heavy fall of rain on the 7th of March, 1873, and a heavier one on the 14th of the same month.

The plaintiff *Scroggie* said they had four feet of water in their cellar on the 7th, and it had gone all but about eight inches when the freshet of the 14th came; and that the overflow of the 7th was occasioned by the Wyndham street drain being stopped by ice or mud. The water from Bond's corner flooded across the street to Petrie's premises, and from thence to theirs. Bond's drain, that is, the box drain across Cork street, connects with the Wyndham street drain. The water, he said, that came into his cellar on the 7th came along Cork street and Wyndham street, also round the corner of Quebec street. The box drain was, he thought, 12 x 14; but he could not say. It was not sufficient to carry off the water that was running on the 7th. The water on the 7th burst through the cellar walls between them and Petrie, and also underneath one corner of the foundation. It did not come in from Wyndham street on the 7th. On the 14th the water came in from across the sidewalk on Cork street through the three gratings of Mr. Petrie, and also under the sidewalk of Wyndham street into our premises. The box drain was burst open on the 14th. Plaintiffs had two gratings on the sidewalk opposite the cellar windows. They are built of stone, with an iron grating over the top. The side walls for the gratings are higher than the surface drain. The water came through under the sidewalk. It did not overflow on Wyndham street. There was plenty of time between the 7th and 14th for defendants to have remedied the evil. There was no opening into the box drain at Bond's corner for the surface water to go in. He thought there was as much as two feet of surface water where it overflowed the sidewalk. The water came through the wall between Petrie's cellar and plaintiffs'. The freshet on 7th and 14th, he thought, were not greater than usual. Nothing was done to the box drain on the 14th.

Mr. *Elliott* said:—On the 14th the water was pouring out with great violence, flowing across Cork street and over the

sidewalk into the openings into Mr. Petrie's cellar. At Bond's corner the box drain was built too near the surface, and therefore must freeze, and the water could not flow through it in the freshet. That, in his opinion, was the cause of the injury. If the drain had been opened between the 7th and 14th, there would, in his opinion, have been no damage. He believed the box drain had frequently to be broken up in the spring to let the water flow past. The box drain should have been placed deeper to protect it from frost.

Mr. *Newton*, a plaintiff, confirmed what Mr. Scroggie had stated. He said the box drain was choked with mud. The Wyndham and Cork street drains were blocked up with ice. There was ice in it in May. There were twelve or fourteen inches of dirt in the Wyndham street drain.

John Chambers said :—On 14th March he was sent to break open the box drain; Marriott, two men and himself were at it. They broke it open near Petrie's corner for about twelve feet. They so worked from nine till noon at it. The water was coming from Bond's corner, flowing over the street and running into Petrie's gratings. After they broke open the box drain, the water ran down the surface drain. There was no water running into Wyndham street drain until they broke up the sidewalk. There was a quantity of ice in the box drain. It was 12 × 14 inches. A stone drain was built in the same place the summer after; it was two feet deep and fourteen inches wide. Wyndham street drain they cleaned in May or June after; it had eight or ten inches of mud in it. Had it not been for the gratings at Petrie's, he did not think the water would have got into the cellar. The gratings were the only places where he saw the water going in.

Mr. *Petrie* said :—The eight feet of surface drain on Cork street just beside Bond's was choked up in March, 1873. The box drain being frozen up, the water from Bond's corner flowed across Cork street into witness's premises. He spoke between the 7th and 14th to Mr. Mitchell, the chairman of the Committee of Roads and Bridges, to open

the surface drain; he laughed and would not give any satisfaction. Witness put the larger grating on Cork street to enable barrels to be put into the cellar. It extended about two-thirds across the sidewalk. These are iron gratings that can be lifted up. There are two other window gratings on Cork street, and one on Wyndham street. The water came through all the openings and over the sidewalk. He put the grating down when he first took possession five years before. It was never questioned. The cause of the water getting into the cellar was the drains being stopped.

Mr. *Cooper*, the town surveyor, said :—The Quebec street drain flows in the Wyndham street drain and then into the box drain. The Quebec street drain drains an area of seven acres. A box drain 12 × 14 is too small for such an area in a freshet. It should be two feet by sixteen or eighteen inches.

For the defence, Mr. *Marriott*, the town overseer of roads, said :—He remembered the freshet of the 7th March. He took the ice out of surface drain on Wyndham street up to Petrie's corner on that day. He took up two crossings, one on Wyndham street and the other across Cork street. That was to bring the water from Cork street to the surface drain of Wyndham street. They left off leaving the water flowing all night down Wyndham street. Between the 7th and 14th they cut the ice out of the surface drain on Cork street. The short piece of covered surface drain on Cork street to Wyndham street drain (at Bond's premises) he did not know was stopped till the 14th. Between the 7th and 14th it was thawing and freezing. On 14th he worked in the morning, and had three men with him, cutting through the ice and gravel (over the box drain) to bring the water out of Cork street round to the surface drain on Wyndham street. It was pouring rain. After dinner they ripped up the top of the box drain for about twelve feet. That caused the water to run into Wyndham street. There was no stoppage at Cork street. The water had been running across Cork street. The surface drain on Cork street was open to its full depth. The box drain was

not burst till after they went to dinner. Ice was the cause of the stoppage of the drain from Bond's corner to Petrie's. It was seven years since they had such a freshet. If the box drain had been free of ice, it would have been sufficient then. He had seen the Quebec street drain full, and the box drain was sufficient to carry it all off. He had no reason to believe the box drain was stopped till the 14th by ice. The water got into Petrie's by the gratings and under the Cork street sidewalk. After the freshet seven years before he had brought clay and puddled the sidewalk on Cork street adjoining Petrie's building, and the person who put down the large grating had disturbed the puddling; in consequence of it water could get under the sidewalk as well as ever it did. The water from Cork street got in through the gratings. He saw no water going in from Wyndham street.

The learned Judge left the following questions to the jury:—1. Were the drains choked? Answer—Yes. 2. Were they choked to the defendants' knowledge? Answer—No. 3. Had defendants reason to believe they might be choked, and did they remain negligently ignorant of their condition? Answer—Yes. 4. Was the permission of the Council asked or granted to open areas or gratings to be placed on the street? Answer—No. 5. Were the drains originally erected in a sufficient manner to answer the purposes then required? Answer—Yes.

The counsel for the defendants objected that the learned Judge should have told the jury that the length of time the gratings were shown to have existed was evidence of consent on the part of the defendants.

Upon these findings the learned Judge directed the verdict to be entered for the plaintiffs as before stated.

In Michaelmas term, November 19, 1874, *McMichael*, Q.C., obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial, on the ground that the verdict was contrary to law and evidence, there being no evidence that the defendants had any knowledge that the drains were out of repair; and for misdirection, in leaving

the question to the jury whether the defendants might have known that the drain was out of repair ; and on the grounds, that on the finding of the jury on the points left to them the defendants were entitled to a verdict, and that there was no duty incumbent on the defendants to drain the plaintiffs' cellars, and no evidence that the water was brought upon the plaintiffs' land, or penned back upon them by any act of the defendants.

In Easter term, May 25, 1875, *Harrison*, Q.C., shewed cause. On one or more of the counts the plaintiffs are entitled to their verdict. The defendants brought the water in the drains to the plaintiffs' premises, and are answerable for the consequences ; the plaintiffs do not say under any circumstances, but only upon proof of negligence by the defendants in the construction or management of the drains ; and they are equally liable, although they did not know the drains were out of order, if from any cause they should have known of it, or had good cause to believe they were or might be out of order. The drain complained of here was near the surface, and might be stopped by ice. There had been a fall of rain a week before the flood, which came in on the plaintiffs' cellars, of which they complain in this action ; and at the first of these floods the drains were found to be choked, and the water flowed all over the street and into the plaintiffs' cellar ; and the defendants knew of all these facts before the flood complained of came, and did nothing to remedy the defect or obstruction.

He cited the following cases : *Bateman v. City of Hamilton*, 33 U. C. R. 244 ; *Ruck v. Williams*, 3 H. & N. 308 ; *Barton v. City of Syracuse*, 36 N. Y. 54, 58 ; *Fletcher v. Rylands*, L. R. 1 Ex. 265, affirmed L. R. 3 H. L. 330 ; *Dunn v. The Company of Proprietors of Birmingham Canal Navigation*, L. R. 7 Q. B. 244 ; *Rowe v. The Township of Rochester*, 29 U. C. R. 590 ; *Mersey Docks and Harbour Board v. Penhallow*, 7 H. & N. 329, 340, affirmed L. R. 1 H. L. 93 ; *Watson v. Northern R. W. Co. of Canada*, 24 U. C. R. 98. There was no contributory negligence by the plaintiffs because of their having cellar

windows for their building, and an excavation in front of them on the sidewalk, and a grating over the excavation, nor even a cellar door in the sidewalk.

M. C. Cameron, Q. C., Guthrie with him, *contra*. Defendants were not bound to drain. If they do they must make the drain sufficient at the time, but here the drain complained of was made several years ago, and was sufficient then, and there was no cause of complaint against it until lately. The drain was choked up, but the defendants did not know it, nor did they remain negligently ignorant of its state. There was no evidence to warrant the finding of the jury against the defendants on that point.

June 19, 1875. WILSON, J., delivered the judgment of the Court.

There is no dispute between the parties as to the fact of the overflow of water from the street into Petrie's cellar,—that is, into the cellar of the building on the corner of Cork and Wyndham streets; and that the water got also into the plaintiffs' cellar, which next adjoined Petrie's premises to the south of them on Wyndham street.

The parties agree, also, that the water got into the plaintiffs' cellar from Petrie's cellars; and perhaps they agree that part of it got into the plaintiffs' cellars, as Mr. Scroggie said it did, from under the sidewalk of Wyndham street.

The way the water got into Petrie's cellar was, by pouring down the three gratings he had on the sidewalk on Cork street, and by getting under the sidewalk on Cork street.

The parties all agree that there was a heavy fall of rain on the 7th, and also on the 14th of March; and that the water on each occasion flowed along Cork street, and also Quebec street, to Wyndham street; and there, instead of passing through the box drain from the north side of Cork street, at the junction of the northerly side of that street with the westerly side of Wyndham street, it flowed over Cork street from the north to the south corner of it, where Petrie's premises were, and so got into his cellar. The cause of that flow over Cork street was, that the box drain

or culvert crossing it, a mere surface drain, was choked up with ice. There was also evidence that about eight feet of the Cork street drain, just at its junction with the box drain, which was covered, was choked up also.

The jury found that the defendants should have known the box drain was choked; and that in effect it was negligence on their part not to have examined it before the 14th of March, and cleared it out if it required it, as it certainly did.

There was evidence to support that finding—the freshet a week before that, when Cork street was also overflowed and the cellars filled, of which the corporate officers had full knowledge; the fact, too, that the box drain just on the surface would be likely to close or be closed with ice or sand, should have induced the defendants to examine such a place at the breaking up of the winter.

It would not be reasonable to require the authorities of every municipality to clear and cleanse all their surface drains and culverts throughout the winter. In townships it could not be done. In cities, towns, and villages it is not necessary or usual to do it. The winters are commonly severe, and rain, although it occasionally falls, and in considerable quantities at that season, has not so far occasioned much inconvenience or damage by reason of the surface drains not being kept clear from ice or snow. Such work at the drains might injure the sleighing. The roads altogether are in a different position in the winter time from what they are when there is no snow; and it would be difficult to do more with them than to make them and keep them as they are by a superior agency—in which state they are, on the whole, more serviceable than we could make them by any act of ours.

It is not intended to be said that in no case and under no circumstances should roads, drains, or sewers be attended to by municipal bodies in winter time; but certainly, in any case in which such bodies are charged with neglect of such works in the winter, or before a reasonable time has elapsed to get rid of the winter's snow and ice, and during which

time, from a heavy snow or fall of rain, or great and sudden thaw, damage of the kind complained of here may happen, it may well be said that a jury should carefully consider whether great allowance should not be made, or whether an absolute defence is not established by shewing conduct on the part of these bodies consistent with and usual in such a time. Here there was only the one box drain across Cork street, which caused the damage. It had done mischief before the fourteenth, and it did not require many hours work to clear it out. We cannot say, then, that the jury have not judged of the case reasonably in this instance.

If the flow of water had been direct into the cellar from the street, either by the cellar window or by being backed up through some drain or opening, we would have seen no difficulty in the case. But here the water got through gratings in the sidewalk, and thence into the cellar of Petrie, and so into the plaintiffs' cellars; and if the water would not have got into the cellars if it had not been for the gratings, we should be of opinion that as the parties were mere licensees at most, or rather had these gratings by mere sufferance, that they could not require the defendants to protect the gratings against damage being done to them, or against the entry of water by them from which it reached their cellars. Those who place gratings or things of the kind on the sidewalks are answerable for damages resulting to others from them, although we conceive the corporation is liable also.

If a grating were insufficiently constructed, and gave way, and some one fell in and was injured, the owner of it would be liable; but so also would the corporation, for they, as a rule, cannot get rid of their responsibility by shewing that some one else was also to blame, unless it be shewn that the grating was there without their knowledge. The fact that it remained so long where it was in this instance is evidence not only of knowledge, but of their consent to have it there.

If the water had got into the plaintiffs' premises by

their own gratings, we should probably, from the opinion we at present entertain, have given judgment for the defendants. But as it got into the plaintiffs' cellar by means chiefly of the gratings in the sidewalk at Petrie's premises, the plaintiffs are not responsible for such gratings being there. As between them and the defendants, the defendants are responsible, just as if some one, by negligence of the owner of the grating being out of order or improperly leaving it open, had been injured.

There is a *prima facie* cause of complaint against the defendants, which they have not repelled; and there is a damage sustained by the plaintiffs, which was not brought on them by themselves in whole or in part, the cause of which is traceable to the defendants, or to such means for which they are answerable.

It is said the parish of common right ought to repair the highway, and no agreement with any person whatever can take off this charge, which the law lays upon it: *Austin's case*, 1 Ventr 183; *ib.* 90, 189; *Rex v. The Mayor of Liverpool*, 3 East 86.

A statute making it obligatory on certain commissioners to repair a public way, will not relieve the parish from its common law liability to the public. The parish must seek indemnity over from the commissioners: *Rex v. The Inhabitants of St. George, Hanover Square*, 3 Camp. 222; *Rex v. The Inhabitants of Netherthong*, 2 B. & Al. 179.

And the case of *Regina v. Longton Gas Co., Limited*, 2 E. & E. 651, better reported in 6 Jur. N. S. 601, shews that persons have no right to cut up the streets or sidewalks for their private purposes, if authority be required on such a point.

It is not necessary to refer to authority what the result would be if the plaintiffs had been injured by the means of their own gratings, as their injury has not resulted from such a cause. We are of opinion the rule must be discharged.

Rule discharged.

ROURKE V. MOSEY.

*Replevin—Justification under—By-law as to impounding animals—Pleading—
General allegation of performance.*

In replevin for a mare defendant justified under a by-law of the township, enacting that the poundkeeper should impound any horse for unlawfully running at large, &c., delivered to him for that purpose by any person resident within the township; and that the person distraining should deliver to him at the same time duplicate written statements of his demand against the owner, and, if required by the poundkeeper, a written agreement with a surety to pay all costs in case the distress should prove illegal, &c. The plea alleged that the mare being taken while at large and doing damage in the township "was duly impounded by a lawfully authorized poundkeeper of said township," &c., and thereupon all proceedings were lawfully had, all steps taken, notices given, and times elapsed necessary to enable the pound-keeper to sell said mare, &c.

Held, on demurrer, plea bad, for not alleging that the mare was delivered to the poundkeeper by a resident of the township; and that this allegation was not supplied by the general averment that all proceedings were had, &c., which applied only to what took place after the impounding.

Held, also, that the other requisites of the by-law, as to the statement of demand, the written agreement, and notices of sale, &c., were covered by the general allegation.

APPEAL from the County Court of the County of Kent.
Replevin for a mare.

Third plea: that by a by-law of the township of Romney, passed in 1860, it was enacted, "that the poundkeeper shall impound any horse, mule, bull, &c., or other animal, for unlawfully running at large, for the breach of any lawful fence, either with or without doing damage, delivered to him for that purpose by any person resident within the township: that the poundkeeper may confine the animal in any enclosed place within the township: that the person distraining and impounding the animal shall at the time deliver to the poundkeeper duplicate statements in writing of his demand against the owner for damages not exceeding twenty dollars done by such animal, and shall at the same time give his written agreement under seal, with a surety, if required by the poundkeeper, which agreement may be after the following form, or in words to the same effect: 'I (or we) do hereby agree that I (or we) will pay to the owner of the animal by me (A. B.) this day impounded all

costs to which the said owner may be put in case the distress by me the said (A. B.) proves to be illegal, or in case the claim for damages now put in by me (the said A. B.) fails to be established.' That in case an animal is impounded, notices for the sale thereof shall be given by the poundkeeper within forty-eight hours afterwards, but no sheep or pig shall be sold till four clear days, nor any horse or cattle shall be sold till after twenty-one clear days from the time of impounding the same: that if any horse or cattle impounded shall not be of the value of \$10, then in every such case it shall be the duty of the poundkeeper to sell the same after eight clear days, and the poundkeeper is hereby authorized to appraise the same: that the notices of sale may be written or printed, and shall be affixed in three public places in the municipality, and shall specify the time and place at which the animal shall be publicly sold, if not sooner replevied or redeemed by the owner or some one in his behalf paying the amount of damage (if any) claimed or decided to have been committed by the animal or animals to the property of the persons who distrained it, together with the lawful fees of the poundkeeper, and also of the fenceviewers (if any): that the owner of any animal or animals not permitted to run at large by the by-law or by-laws of the municipality, shall be liable for any damages done by such animal or animals, notwithstanding that the fence enclosing the premises was not of the description required by such by-law or by-laws: that if the fenceviewers decide that the fence was not a lawful fence, they shall certify the same in writing under their hand, together with a statement of their lawful fees, to the poundkeeper, who shall, upon payment of all lawful fees and charges, deliver such animal to the owner if claimed before the sale thereof; but if not claimed, or if such fees are not paid, the poundkeeper, after due notice, as required by the by-law, shall sell the animal in the manner before mentioned at the time and place appointed in the notices, and the poundkeeper, after deducting his own fees and those of the fenceviewers (if any), and paying over the

same, shall pay over any balance to the township treasurer, to be paid to the owner of the animal if claimed within one year, and the treasurer is satisfied that he is the *bonâ fide* owner." That the said mare, after the passing of said by-law, and while the same was lawfully in force, and before the time when, &c., was permitted and allowed, and was in fact running at large as a free commoner within the said township of Romney, and before the said time when, &c., was used and accustomed to, and did go along the roads and open commons and woods in said township, and did go through the enclosed lands and jump over and through divers fences, which at the time as against the said mare were lawful fences in the said township, and was then and there running at large and leaping over and throwing down fences in said township contrary to the provisions of said by-law; and thereupon the said mare being seized and taken while so at large in said township, and whilst doing damages to the enclosed lands in said township and to the fences around the same, was duly impounded by a lawfully authorized poundkeeper of said township in a common pound in the said township; and thereupon all proceedings were lawfully had, all steps taken, notices given, and times elapsed, &c., &c., necessary to enable the said poundkeeper lawfully to sell the said mare; and no owner being known to said poundkeeper, and no one having redeemed or replevied the said mare, the said poundkeeper publicly sold the said mare to the highest bidder at the time and place appointed for the sale thereof, to one John Wharmer, and the defendant, after divers mesne sales of said mare, bought the same, and ever since the time when, &c., &c., owned and took possession of her as owner under the title of said John Wharmer to the same by virtue of the said public sale.

Demurrer to the third plea, on the grounds:—

That the plea does not shew that the mare was delivered to the poundkeeper by any person resident within the township of Romney, nor does it state that the person distraining or impounding the said mare delivered to the poundkeeper a duplicate statement in writing of his

demand, or that he gave a written agreement under seal with a surety, or that such agreement was or was not required by the poundkeeper, or that notices for the sale of the mare were given within forty-eight hours, or whether the mare was sold before or after twenty-one clear days from the time of impounding, or whether the mare was of greater or less value than \$10.

Joinder.

In April term, 1875, the demurrer was argued before the learned County Judge of the County of Kent, by *Houston*, for the plaintiff, and *Atkinson*, for defendant.

Wells, Co. J., gave judgment, as follows:

"I think the said third plea sets forth with all necessary particularity sufficient grounds of defence to the plaintiff's action, and that the same would have been considered good on general demurrer before the Act was passed doing away with special demurrer."

From this judgment the plaintiff appealed to this Court.

The reasons of appeal were the same as the grounds of demurrer before stated.

In Easter term, May 26, 1875. *Harrison*, Q.C., for the plaintiff, appellant. The plea is insufficient, for the reasons stated as grounds of appeal. The want of all these necessary averments is not cured by the general allegation of the performance of all acts and of the lapse of all time, and that everything had happened to warrant the sale of the mare which had been taken up and impounded. The plea is especially defective in not shewing that the person who made the distress was a resident within the township, according to the express provision of the by-law set out, and in not shewing that the person distraining gave the necessary agreement under seal to be responsible for the consequences if the distress should prove to be unlawful, or if the claim made for damages failed to be established. He referred to the C. L. P. Act, sec. 80; *Bloomer v. Darke*, 2 C. B. N. S. 165; *Tabor v. Edwards*, 4 C. B. N. S. 1;

Roberts v. Brett, 6 C. B. N. S. 611, 633; *Hollis v. Marshall*, 2 H. & N. 755; *Walker v. Kelly*, 24 C. P. 174; *Friar v. Grey*, 15 Q. B. 891, in Ex. Ch. 901; *Harrison's Municipal Manual*, 3rd ed., 334.

M. C. Cameron, Q.C., contra. The plea shews the poundkeeper himself impounded the mare, and therefore any insufficiency in not shewing the person who distrained is avoided: Municipal Act 1873, sec. 381. The omission to observe the formalities of the by-law will not render the seizure and sale wholly unlawful. Besides, the general averment of performance meets the objection. As to the agreement in writing to be given, that is wholly for the poundkeeper's protection, and it is only to be given *if required*. He referred to *Carey v. Tate*, 6 O. S. 147; *Clarke v. Durham*, Rob. & Har. Dig. 431; *Clark v. Lewis*, 35 Ill. R. 417; *Rounds v. Stetson*, 45 Maine 596.

June 19, 1875. WILSON, J., delivered the judgment of the Court.

The general averments of performance of conditions, and that all times had elapsed and all things had happened to entitle the party to maintain his action, or to get the benefit of the defence pleaded, are inapplicable in certain cases.

A deed of arrangement under the Bankruptcy Act must shew that it was made for the distribution of the whole of the debtor's estate, and for the benefit of all his creditors; and such a statement, if not made in the pleading, will not be cured because there is the general allegation that "all matters and things were done and happened according to the said Act to make the deed and the said release therein contained as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the deed as if they had duly signed the same."

Cresswell, J., said, in *Bloomer v. Darke*, 2 C. B. N. S. 165, 173: "The general words cannot be read surely * * 'all words were inserted in the deed necessary to make it a compliance with the Act.'" The Court must see that the

necessary matter is in fact contained in the deed : *Tabor v. Edwards*, 4 C. B. N. S. 1, 14, 16, 19.

If it were necessary to shew in this case that the mare was delivered to the poundkeeper by a person resident within the township, the want of the allegation cannot be supplied by the ordinary general words of performance, &c. That fact becomes essential as a matter of right and title to take the mare by way of distress by the person who has seized her. It is his right and power to do so as distinguished from the right and power of any other person. One who is grieved may be entitled to sue, but he must shew by express averment he is such a person—a general averment that all things happened, &c., will not answer : *Hollis v. Marshall*, 2 H. & N. 755.

The plea does not in the general averment apply to anything which took place before the impounding. The plea alleges that the mare was duly impounded, and thereupon all proceedings were lawfully had, &c.

There is nothing then in the plea which asserts by general averment or otherwise that the person who seized the mare was a resident of the township,—nothing besides the statement that “the said mare, being seized and taken while so at large in said township and whilst doing damage to the enclosed lands in said township, and to the fences around same, was duly impounded by a lawfully authorized poundkeeper of said township, &c.”

Who it was seized the mare, whether a resident or a non-resident, does not appear. Why that provision was made does not appear. The U. C. Act 1 Vic., ch. 21, sec. 32, contained the like words, “that may be delivered to him by any person resident within his division taking up the same.”

Under that Act, *Clarke v. Durham*, Rob. & Har. Dig. 431, was decided. The Court there said the poundkeeper, who was one of the defendants, should have shewn that he received the cattle impounded from a person within his division.

That provision has, I presume, remained the same to the present time. It is contained in the Consol. Stat. U. C.,

ch. 54, sec. 360, sub-sec. 2, and in the Municipal Act of 1866, sec. 355, sub-sec. 2, and it remains there to this time.

These general pound law provisions have not been embodied in the Municipal Act of 1873, because they are not properly Municipal law as explained in p. xxxvi. of the schedule of statutes consolidated which precedes the commencement of the Act of 1873.

Many of the general provisions of the pound law and in the statutes referred to are embodied in the present by-law.

We cannot say that the requirement of the statute or of this by-law, that the delivery of the goods taken be made to the poundkeeper by a person resident within the township, is not of any consequence. Seizure for damage feasant is always made upon the land trespassed on—and of course by a person who was there at the time—and it must be made by the owner or occupier of the land, and cannot be made by a mere stranger.

This by-law will prevent a mere stranger to or in the township from taking up a horse or other animal running at large, or from interfering with cattle damaging private property where the owner of the land does not choose to complain of it.

A person may of common right take up cattle for damage feasant; and it may be that the owner of land in the township, although himself not a resident of the township, may take up and impound in such a case, notwithstanding the terms of the by-law, just as fully as he ever could. In such a case it would appear the person had land in the township, and distrained for damage feasant.

Here there is nothing to shew that the owner of any land, or any one interested in the township by residence or otherwise, made the distress. He may, therefore, have been a mere volunteer or stranger, and acting without the consent, or at the request, or for the benefit of any one in the township.

We think the plea is not sufficient for the want of a proper allegation of the kind referred to. As to the agreement in writing to be given by the distrainor, that is for the

benefit of the poundkeeper as his indemnity, and he may waive it if he pleases. As to the want of a duplicate statement of the demand of the distrainer, that can do no harm so long as it does not appear any damages were claimed; and as to the other matters about the notices of sale and the like, they are certainly covered by the general allegation of observance of all matters, &c., at the end of the plea.

The plea is loosely drawn, but it may be good enough in law excepting as against the objection mentioned.

We must allow the appeal, but without costs, and that judgment be given by the Court below for the plaintiff on the demurrer to the plea.

Appeal allowed.

MILES WASHINGTON COOK V. SARAH COOK.

Slander—Excessive damages—Evidence.

The plaintiff sued his stepmother for slander, in having said of him that when his father was ill, he and his sister went into his bedroom and gave him a drug, after which he went into a doze and never recovered, and that the plaintiff and his sister had killed him. There was another count for charging the plaintiff with having robbed her.

It appeared that the plaintiff and defendant were not on friendly terms, arising out of the defendant's marriage with the plaintiff's father: that the defendant was a garrulous old lady, prone to talk of the family difficulties; and that the words alleged were spoken when the plaintiff's brother-in-law and another person went to see her to get her to sign a release of dower. The defendant denied having charged any criminal offence, and it appeared that the plaintiff, who was a medical student, had administered some medicine to his father shortly before his death. There was no proof of any actual damage; but the jury gave \$500.

Held, that the verdict was excessive; and the learned Judge who tried the cause being dissatisfied with it on this ground, a new trial was ordered unless the plaintiff would reduce it to \$100.

Held, also, that it was admissible to ask the plaintiff's witness whether the plaintiff was not a student of medicine, although the declaration did not charge that the words were spoken of him in that character.

SLANDER. Declaration.—In the first count the words laid were: "That the plaintiff and Mrs. Davis (his sister) went in (meaning into the bedroom of Jacob Cook, the father of the plaintiff) and gave him (Jacob Cook) a drug,

when the old man said, 'You have finished me now;' he (the father) went into a doze, from which he never recovered. They (meaning the plaintiff and his sister) killed him."

Second count: alleging that the words were, "They killed him."

The third count charged defendant with saying "that Washington Cook (the plaintiff) robbed her (defendant's) house and carried away things therefrom"—innuendo, that the plaintiff had stolen goods of the defendant.

Plea: Not guilty.

The case was tried at the Fall Assizes, 1874, at Toronto before Burton, J.

From the evidence given at the trial, it appeared that the defendant, an old lady, was stepmother to the plaintiff, and the plaintiff was also executor of the deceased, his father, the defendant's late husband: that on one occasion, at the defendant's house, one *Bowell*, and one *Sheppard*, a brother-in-law of the plaintiff, went to the defendant's to get her to release her dower on some property: that she began talking of the ill-treatment she received from the plaintiff, and persisted in speaking of her family grievances, and they testified she said to them that the plaintiff and his sister, Mrs. Davis, had administered a drug to their father, which they forced him to take: that he said, "You have fixed me now, or finished me now": that he fell into a doze, from which he never recovered, she then added, "they killed him; Mr. *Bowell*, they killed him."

The witness *Bowell* suggested to *Sheppard* that it should not be mentioned to the plaintiff, as it was likely only to widen the breach; he never communicated it to the plaintiff, or to any one, unless perhaps his wife; the conversation lasted an hour with the defendant; she complained of being badly used by the family—that the plaintiff had taken her buffalo robes and other property.

The witness *Sheppard*, at the instance of his wife, told the plaintiff what the defendant had said. He stated that ever since the defendant married the plaintiff's father, there was an unfriendly feeling between members of the family

and the defendant ; and that at the time of the conversation she was much excited, and dwelt on the injuries she received. This witness said he knew the plaintiff gave his father stuff of some kind, but he did not think he was giving him anything beyond what the medical man prescribed. The conversation was on the 5th June, 1873. He also spoke of her charge as to the buffalo robes.

A witness of the name of *South* also testified to the defendant speaking to him in March, 1873—her husband died in the beginning of that month—and saying that the plaintiff had taken away her cows, stolen her buffalo robes, and that there was no question but that they, the plaintiff and his sister, killed their father.

This witness, on cross-examination, said he had been some time in Brompton gaol ; he could not say to whom he mentioned this conversation. The character of this witness as to veracity was sworn to by two witnesses as being very bad.

For the defence the defendant was sworn, and stated she remembered telling something to Mr. *Bowell* on the occasion he referred to : that she could not help telling them what happened when her husband was sick : that she never said to him or to *South* that they had killed her husband : that what she said was that the plaintiff had his hand under her husband's head, while he had a cup at his mouth ; he resisted it, saying, " I won't take, I can't take," and that he said, " Now you have done it : " that she never said they gave the old man a drug or that they had killed him ; he lived for some days after.

The plaintiff was not examined.

During the examination of the witness *Sheppard*, the plaintiff's counsel asked him about the plaintiff being a student of medicine. This evidence was objected to by the defendant's counsel.

The learned Judge allowed the question, and the witness stated that he was aware that the plaintiff had been a student of medicine for some time.

The plaintiff had a verdict, and \$500 damages.

In Michaelmas term, November 18, 1874, *McMichael*, Q.C., obtained a rule *nisi* to set aside the verdict and for a new trial, on the ground that the damages were excessive, and for the admission of improper evidence tending to aggravate the damages by proving that the character of the plaintiff as a student of medicine was assailed, there being no special damage alleged or charge that he had been slandered in that character.

During this term, May 25, 1875, *Meyers* shewed cause. The damages are not excessive, and, if they were, no new trial would be granted on this ground in libel. The evidence objected to was not given with the view of aggravating the damages. He referred to *Cooke* on Defamation, 170; *Starkie* on Slander, ed. 1869, 558; *Townshend v. Hughes*, 2 Mod. 150; *Higmore v. Earl and Countess of Harrington*, 3 C. B. N. S. 142; *Swan v. Clelland*, 13 U. C. R. 835, 339.

M. C. Cameron, Q.C., contra, The evidence, attaching the character of medical student to the plaintiff, gave a meaning to the words used other than they would in their ordinary sense have had without them, and it was improperly admitted. Evidence may be given to shew the position the plaintiff holds, but not to affect the sense of the words used. The cases cited for the defendants are overruled by the modern authorities, which decide that a new trial may be granted in a case like this, for excessive damages.

During this term, June 19, 1875, MORRISON, J., delivered the judgment of the Court.

In this case we are asked to set aside the verdict on the ground of excessive damages, and for the reception of improper evidence, which was calculated to aggravate and increase the damages.

The action is one of those unfortunate cases which now and then come before the Courts, arising out of family quarrels and personal feelings. The plaintiff is the stepson of the defendant, and he is also executor of his deceased father, the defendant's late husband.

It is quite apparent from the evidence that the plaintiff's family and defendant were not on friendly terms, arising out of the marriage of the defendant and the deceased, and alleged harsh acts of the plaintiff as executor; and the defendant being a garrulous old lady, and prone to talk of her family difficulties, in a conversation with a brother-in-law of the plaintiff and another person, who were called as witnesses, and who went to see the old lady to obtain her consent to bar her dower in some property, and while dwelling on her husband's death, made use of the expressions complained of.

From the evidence of one of the plaintiff's witnesses, it appeared that the plaintiff administered some medicine to the deceased shortly before his death.

One cannot help seeing that although the words used might imply a criminal offence, yet it is possible that such was not her intention; and it can hardly be supposed that what she is alleged to have said could affect in a great degree the character of the plaintiff. No evidence was given to shew that it really did do so, and we are left to the legal implication that it did. Still less can we think that it resulted in any pecuniary damage to the plaintiff.

No special damage was laid in the declaration and none proved, but it is contended that the learned Judge allowed evidence which ought not to have been received, and which was used to intensify the case against the defendant, and so to enhance the damages. We are not prepared to say that the question might not be asked whether the plaintiff was not a student of medicine.

We think it was admissible, but not for the purpose (as the declaration was framed), to shew that the defendant used the words attributed to her for the purpose of injuring the plaintiff in his character as a student of medicine; nor should it have been used, as complained of by the defendant's counsel, for the purpose of influencing the jury by the suggestion to the jury that the defendant made the accusation of the plaintiff giving his father a drug, as one which would be likely to be believed by those she spoke to by reason of his being a medical student.

The defendant, who was examined at the trial, denied that she used the words charging a criminal offence, and explained what she did say.

As we say, there was no evidence of any actual damage or injury of character other than that which may be implied; and considering the position of the parties, and the occasion when the alleged words were spoken, it appears to us that the damages were far in excess, and one cannot account for the amount of the verdict.

We should have been better satisfied with an amount sufficient to carry full costs.

The learned Judge who tried the case was surprised at the amount of the verdict, and is not satisfied with the finding in that respect. We therefore think that there should be a new trial, unless the plaintiff consents to reduce the verdict to one hundred dollars, and in such case the rule will be discharged.

Rule accordingly.

IN RE COLEMAN, AN INSOLVENT.

Insolvent Act of 1869—Warehouse receipts—Rights of pledgees as against the assignee—Factors' Act, Consol. Stat. C., ch. 59.

One C., being the lessee of a coal yard and premises, assigned the property to S. & H., who agreed to receive as warehousemen therein such wood and coal as C. might deposit, and grant him warehouse receipts therefor, in consideration of which he agreed to pay them $2\frac{1}{2}$ per cent. on the value of such goods, and to give them a first lien therefor. C. continued to hold possession of the premises as before the assignment, no visible change being made; his sign remained up, he brought in and took out coal as he pleased, and he was to pay the rent and taxes; but S. & H. entered from time to time to see that there was coal enough to meet their receipts, and on some occasions they prevented him from removing more coal, fearing that there would not be enough for this purpose. It was expressly agreed between them that all coal taken out for which receipts had been given, should be replaced with other coal. C. having become insolvent, a question arose as between his assignee and the receipt holders, and R. & Co., mentioned below, as to the right to the coal in the yard.

Held, that S. & H., being legal owners of the premises, could grant warehouse receipts.

The receipts stated that S. & H. had "received in store from vessels, deliverable only on surrender of this receipt duly endorsed and payment of charges, to order of C.," so many tons of coal: *Held*, sufficient in form: that they imported *primâ facie* that the coal was the property of C.: that the omission to state for or from whom it was received was immaterial; and that, as to the description of the goods, it was unnecessary to state the quality, for the holder might elect, or to identify the specific property covered by the receipt.

One of the receipts were given to one Cockburn, as security for an acceptance which he gave at the time for C.'s accommodation; another to S. & H. as security against their endorsement for C.; and another to S. & H. was given after C.'s cheques had been refused payment, on their application to him for security:

Held, that these receipts were given for debts within the Act respecting warehouse receipts, &c., 31 Vic ch. 11, D.

Held, also, that under sec. 10 of the Insolvent Act of 1869, the assignee could take only what was the property of the insolvent, and that S. & H., whether the receipts were strictly regular or not, had a lien upon the coal in the premises to the extent of the receipts outstanding and for their commission.

Some of the coal had been sent to C., the insolvent, by R., to sell for him on commission, after the receipts had been given, and were outstanding: *Held*, that C. could not, under the Factors Act, Consol. Stat. C., ch. 59, pledge this coal for payment of the receipt holders; and that R. was entitled before them to so much of his coal as remained unsold.

APPEALS from the decision of the Judge of the County Court of the County of York.

There were two appeals presented to the Court by the same parties, David Sylvester, Solomon Sylvester, and James Henry Hickman, Wharfingers.

The petition in one case—after setting out the petition to the Judge in the Court below of Henry Clay Roberts, and the order of the Judge made thereon on the 19th of April, 1875, by which it was ordered that the assignee should deliver to H. C. Roberts & Co., less such portion as might have been sold for arrears of rent and taxes, 1235 tons, 335 lbs., of certain kinds of coal designated in the order, with costs to be paid out of the estate—prayed that the order might be rescinded; and that it be declared by this Court that the petition of H. C. Roberts to the Court below should have been and that the same be now dismissed, or that such other order might be made as this Court might direct.

The petition in the other case—after setting out the petition to the Judge of the Court below of the present appellants, Sylvester and Hickman, and the order of the Judge made thereon on the 19th of April, 1875, by which it was ordered that the petition of the present appellants should be and the same was thereby dismissed with costs, to be paid by Sylvester & Hickman—prayed that the order might be rescinded; and that it be declared by this Court that the appellants are entitled to the coal in the petition mentioned for the purposes therein set out, or that such other order might be made as to the Court might seem just.

The evidence, exhibits, judgment and reasons of appeal were alike in each.

The facts appeared to be that Coleman, the insolvent, being the lessee of certain premises in the city, which he used as a wood and coal yard, on the 5th of September, 1872, duly assigned the demised property to the appellants. And by an agreement, dated the 25th of the same month, between the same parties—after reciting the assignment of the demised premises, and reciting also that it had been agreed between the insolvent and the appellants that the appellants should receive into the said premises the wood and coal of the insolvent as warehousemen, and should grant to the insolvent warehouse receipts for a certain portion thereof, for the use and accommodation of the

insolvent—the appellants covenanted with the insolvent that they should receive, as warehousemen, into the said assigned premises such wood and coal as the insolvent might offer for deposit therein; and that they would grant to the insolvent, at his request, warehouse receipts for any portion thereof. And the insolvent covenanted with the appellants to pay to them, in consideration of the agreement about the receipts, a per centage of two-and-a-half per cent. on the value of the goods upon or for which receipts should be so granted—such value for the said purpose to be fixed at the cost price of the said goods as laid down in the said warehouse and premises, for which per centage and remuneration the appellants were to have a first charge and lien on all goods so deposited with them. The appellants took and continued to have the actual occupation of the demised premises.

It was further expressly agreed between the appellants and Coleman, that all coal charged with receipts which Coleman took out, he should replace with other coal.

The insolvent, after the making of the agreement, deposited from time to time with the appellants large quantities of coal and wood, in pursuance of the agreement; and the appellants also granted from time to time to the insolvent, at his request and for his accommodation, warehouse receipts for portions of the coal and wood so deposited with them. On the 28th of November, 1874, there was deposited with the appellants, under the agreement, about from 3,300 to 3,500 tons of coal, and from 10 to 15 cords of wood, which remained there at the time of the presentation of the petition below.

And prior to and on the said 28th of November the appellants had granted to the insolvent, under the agreement, warehouse receipts for 2,700 tons of coal and upwards, being of the value of from \$19,000 to \$20,000, and which warehouse receipts were on the day last mentioned, and at the time of the presentation of the petition below, then outstanding; and the appellants were and are liable to the holders of the warehouse receipts for the quantity

of coal and wood mentioned in the same, except with respect to two of the said receipts, one for 500 tons and the other for 200 tons, with respect to which said two receipts more than six months from the issuing thereof had elapsed, and as to their liability on which they made no admission.

These warehouse receipts were in the following form:—

“No. ——— Church Street Wharf, ——— 1874.

“Received in store from schooners, deliverable only upon surrender of this receipt, duly endorsed, and payment of cheques to Messrs. J. F. Coleman & Co.

MARKS.	DESCRIPTION OF PROPERTY.
(500).	Five hundred tons of coal.

“This is to be regarded as a receipt under the provisions of Statute 22 Vic., ch. 20, being 22 Vic., ch. 54 of the Consolidated Statutes of Canada, and the amended Statutes 24 Vic. ch. 20.

(Sgd.) “S., B. & H.”

“Not insured and subject to storage only.”

The insolvent was on the 28th of November, 1874, and still is indebted to the appellants for their commission in respect of the wood and coal, for which they had granted warehouse receipts, under the agreement, in the sum of \$405, for which they were entitled to a lien on the coal and wood so deposited with them by the insolvent.

On the 28th of November, 1874, the insolvent became embarrassed, and a writ of attachment, under the Insolvent Act, issued against him at the suit of Arthur J. Yates, under which the sheriff of the County of York attached all or a portion of the estate and effects of the insolvent in this county.

The appellants complained that the sheriff and the official assignee had taken forcible possession of the premises, and the wood and coal; and they said they were willing after all their own claims were paid, and the warehouse

receipts they had given were satisfied, and all other charges were paid, to hand over the residue to the assignee.

Mr. *Hickman*, one of the appellants, in his examination in the Court below, said the demised premises consisted of the lot, wharf, and office. "I presume the object of entering into the agreement was that he would be able to raise money for the purpose of carrying on his business, and we wished to make money at the same time, as it is our business as wharfingers to issue warehouse receipts. We issued warehouse receipts to Coleman & Co., under the agreement, a number of which have been returned—there are still outstanding the following:—

May 28.....	500 tons.
“	200 “
June 27	400 “
July 4	500 “
July 23.....	400 “
“	700 “

Total..... 2,700 tons.

“Of these we hold one for 500 tons against endorsement for \$3,000 held by Merchants Bank, and one for 200 tons for freight charged against Coleman and earned by us.

One receipt to C. J. Smith, for 500 tons.

Two to Chisholm, Montreal, for { 400 “
700 “

One to Isaac Cockburn, for400 “

“I am not aware of my own knowledge that these parties hold these receipts, but have been so informed. They were issued to Coleman, who endorsed them as he required. * * * Coleman had his sign up on the premises when he assigned to us. The sign remained up after the transfer of leases to our firm. I am not sure if the sign was up when the lease was assigned. I know it was up afterwards, and is up still. Coleman & Co. occupied and used the premises the same after the assignment of the lease as before. There was no change of occupation. He received coal on the premises the same afterwards as previous to the assignment. Mr. Coleman sold and delivered coal from time to

time as it was ordered after the assignment of the lease to us, and after the warehouse receipts were issued. We were aware he was doing so. A stranger would not be aware that there was any change. Coleman & Co. were to pay the rent and taxes. Our firm have not paid either rent or taxes for the premises. Coleman used the same as if it were his own, but we went on the premises from time to time, and took care to see that there was a margin to cover our warehouse receipts. We never had anything landed on the premises that belonged to us. Mr. Coleman never handed over the premises to us other than by the leases. Mr. Coleman had a man in the office for the purpose of attending to the business. He also had men, horses, and carts there from time to time for delivering the coal. The only time we were there was, when we wanted to see that the margin was there to cover our warehouse receipts. This continued up to his insolvency. We issued the warehouse receipts in this way: Coleman would come to us and say that he wanted a receipt for so many tons; we would grant the receipts, knowing that there was a margin sufficient to cover the receipts. The coal was on the premises used by Coleman, on the yard, and on the wharf. There were no warehouse receipts issued for coal to arrive. There was always sufficient coal on the wharf or in the yard to cover the different warehouse receipts when issued. There was always sufficient to cover the different warehouse receipts mentioned as standing out when issued. I knew he was hard up for some time back. I did not know before issuing any of the warehouse receipts that he was selling on commission. We stopped Coleman from selling on two occasions, because we thought our margin was too close. This was three or four weeks before the insolvency. * * Although we stopped Coleman from selling, we allowed him to go on again as he received more coal. * * The receipt for the freight is marked H. It was one he had retired, that is, he had used before and got it back into his possession, and then he gave it to us. We hold the check of Coleman, the coal, and Cockburn's acceptance for the one sum of \$900. * *

The coal was not under Coleman's control, but under our control. He exercised control over it. He received and delivered it, and received payment for it without our interference. * * We claim 2,500 tons of coal if Cockburn's acceptance is paid, and 2,700 tons if not paid. We claim from 1,200 to 1,500 tons of soft coal and about 1,100 to 1,200 tons of hard coal. * * The last of the receipts outstanding was given on 23rd July, 1874. After this both hard and soft coal came in and went out from the premises. * * I recollect the arrival of the last lot from Roberts, 1,303 tons, in November, 1874. I had no knowledge the coal belonged to any any one but Coleman at the time. I had a conversation with Coleman about the coal whilst it was being unloaded. I asked him how did he get on at Rochester. He replied that he had done splendidly, that he had bought the coal at three and six months."

The above are the facts according to the statement of the appellants in their petitions and in their examinations.

C. J. Smith, mentioned in the evidence of Mr. Hickman, held the following document, signed by J. F. Coleman & Co., and himself:—

"Toronto, July 4, 1874.

"Whereas J. F. Coleman & Co. have this day received from C. J. Smith, Esq., his promissory note for \$3000 (three thousand dollars) as an accommodation to them; and whereas in order to secure the said Smith for the due payment of the said note by said Coleman & Co. they have procured the transfer to said Smith of the annexed warehouse receipt for 500 tons of coal as a security for said loan and accommodation, upon the understanding that said Smith is to hold same as security, but that in default of due payment by said Coleman and Co., of said note the said Smith shall be and become the absolute owner of said coal and entitled to the immediate delivery thereof, but on due payment of said note by said Coleman & Co. said Smith agrees to transfer said warehouse receipt to them."

Annexed was a warehouse receipt, in the form above given, for \$500 tons of coal.

The following are the facts relative to the claim of H. C. Roberts & Co., according to their petition and examination.

Their petition in the Court below stated that about the 19th September, 1874, they shipped from Rochester to their own order at Toronto, a cargo of coal by the "Nett Woodward," to be stored with the insolvent in his coal yard, and to be sold by him on their behalf on commission. On the 5th November they wrote to the insolvent: "Please sell our coal in your yard that is held for our account, and report to us on the 15th and 30th of each month all coal sold to these dates, and remit to us the 10th of the following month the wholesale price for the amount you have sold; the balance left, after deducting the wholesale price and interest from the amount you received for the coal, you can have for your services, dockage expenses, &c." The insolvent on the same day answered: "We can and will receive in store for your account one to two thousand tons of coal, furnishing you with a report of sales of same on the 15th and 30th of each month, remitting to you the wholesale rate of same with interest on the 10th of the following month, until the whole amount of the shipments are disposed of. We accept of the difference between the wholesale and the retail rate in payment in full for the lake freight paid by us, dockage and services."

The coal sent by the "Nett Woodward" was agreed to be put under this last agreement, and Roberts & Co. thereafter shipped to Toronto. That quantity was 315½ tons stove at \$6.50—\$2,050.75. The subsequent shipments were as follows:—

Nov. 11, Schr. Acacia.....	381½ tons stove....	at \$6 65—	\$2,536 97
" 11, " West Wind.....	270 " grate ..	at 6 20—	1,674 00
" 14, " H. B. Rathburn ..	265 " egg.....	at 6 20—	1,643 00
" 16, " Eureka	315½ " chestnut..	at 6 15—	1,940 33
November 19, total			1,547½ tons. \$9,845 05

The sheriff seized the coal under the said attachment dated 28th of November, 1874, and Sylvester & Hickman claimed the coal by virtue of warehouse receipts they had issued.

The Judge of the County Court made the order in their favour before mentioned, which the appellants contended should be rescinded.

The insolvent sold of Roberts's coal :—

	Tons.	Lbs.
Stove.....	96	700
Egg	149	1,020
Nut	66	625=312-345

There would still be of Roberts & Co.'s coal remaining 1234 tons, 1355 lbs., as shewn below, viz. :

	STOVE.	GRATE.	EGG.	CHESTNUT.
SENT	$315\frac{1}{2}$ $381\frac{1}{2}=697$	270	280	315.1000
SOLD. . .	96.700	None.	149.1020	66.0625.
LEFT. . .	600 App.	270	115.980	249.375=1234.1355.

The insolvent said that the other coal in the yard was his own coal. He put Roberts's coal on the top of his own coal, according to the kinds. There were 600 to 800 tons of the insolvent's own coal in the yard where Roberts's coal was dumped.

Upon these facts, and upon further evidence before the learned Judge of the Court below, by persons that it was customary for coal dealers to grant warehouse receipts upon their own coal, and to sell on, notwithstanding the receipts given, so long as they keep on hand enough to meet the receipts—judgment was given in the Court below dismissing the petitions of Sylvester & Hickman, who claimed to be entitled to retain all the coal for which they had given or held warehouse receipts and for their commission; and the petitions also of C. J. Smith and Isaac Cockburn, two holders of warehouse receipts; and that Roberts & Co.'s petition should be allowed, by which he should have delivered to him 1,235 tons and 355 lbs., the portion of his coal remaining unsold, or so much of it as could be identified as the coal he had shipped, less any quantity of it which might have been sold for rent or taxes.

In Easter Term, May 26, and 27, 1875, the case was argued by *Harrison, Q.C.*, *Hagel* with him, for *Sylvester & Hickman*, as against *Roberts & Co.*'s claim, and also as against the assignee in insolvency. None of *Roberts & Co.*'s coal was in *Coleman*'s yard when the warehouse receipts were given, which are now in dispute. There was other coal there upon which the receipts were given. That coal was, as is customary with all kinds of property which is covered by warehouse receipts, sold off from time to time as sales could be made, and the quantity taken, as is also customary with respect to other property, was made up by the purchase of other coal and the deposit of it to replace what had been sold. Such a practice is a custom of trade and is allowable: *Wilmot v. Maitland*, 3 Grant 107; *Clark v. Western Assurance Co.*, 25 U. C. R. 209; *The South Australian Insurance Co. v. Randell*, L. R. 3 P. C. 101; *Todd v. Liverpool & London Globe Insurance Co.*, 18 C. P. 192; *Box v. Provincial Insurance Co.*, 15 Grant 337, affirmed on appeal, 18 Grant 280; *Coffey v. Quebec Bank*, 20 C. P. 555; *Boies v. Hartford & New Haven R. W. Co.*, 9 Am. R. 347.

The warehouse receipts were placed by *Coleman* in the hands of persons from and through whom he raised money, *Sylvester & Hickman* holding two of such receipts for their own special acceptances and endorsements for *Coleman*. *Sylvester & Hickman* claim as against all parties to be entitled to hold the coal until they are indemnified as against the warehouse receipts they have given which are still outstanding, and until their commission account for the receipts so given has been paid. The appellants *Sylvester & Hickman* are entitled to claim against *Roberts & Co.*, because *Coleman* was their factor; he had their coal on their own statement in his possession for sale generally: *Consol. Stat. C.*, ch. 59, secs. 1, 2, 3. *Coleman* could therefore charge it by these warehouse receipts. They cited, *Bank of British North America v. Clarkson*, 19 C. P. 182; *Royal Canadian Bank v. Miller*, 29 U. C. R. 266; 31 Vic., ch. 11, sec. 7, D.; *Sheppard v. Union Bank of London*, 7 H. & N. 661; *Vickers v. Hertz*, L. R. 2 Sc. App. 113; *Hey-*

man v Flewker, 13 C. B. N. S. 519. As to the quantity to be given up to Roberts & Co., if that has to be done, there was an error made in the Court below. The quantity received by Coleman from Roberts & Co. was in all 1,547 tons, including the 315 tons sent in September. But of that September coal, and before any other of Roberts's coal came in, about 300 tons were sold. Then it is shewn by the evidence that of the later coal sent, that is, after September, 300 tons more were sold. That would reduce the unsold quantity of Roberts's coal to about 947 tons, while the Judge of the Court below has directed that he should receive about 1,235 tons.

The following cases were also referred to: *Fergusson v. Norman*, 5 Bing. N. C. 76, 87; *Browne v. Dawson*, 12 A. & E. 624, 627.

M. C. Cameron, Q.C., for Roberts & Co. The Assignee does not dispute the claims of the persons he represents. The arrangement between Sylvester & Hickman on the one part, and Coleman on the other, was for the mere purpose of enabling Sylvester & Hickman to give warehouse receipts to Coleman to enable him to raise money upon them. Roberts & Co. at first intended to sell the coal to Coleman, but that was changed to a sale on commission only. Coleman was a factor of Roberts & Co. under the statute, if there are any persons who dealt with Coleman who are entitled to the protection of that Act as against Roberts & Co. Sylvester & Hickman cannot set up that Act in their favour. They never got possession of the coal. They did not buy it, nor did they make any advances upon it. The warehouse receipts in their present form are not valid at all. They do not state who the owner of the property is. They read: "Received in store from vessels, deliverable only upon surrender of this receipt, duly endorsed, and payment of charges, to order of J. F. Coleman & Co," (so many) "tons of coal." A reference is made in the receipts to the 22 Vic. ch. 20, Consol. Stat. C. ch. 54, and the amended Act 24 Vic. ch. 23. But the proper statutes are those passed in 1867, and 1871: *Bank of*

British North America v. Clarkson, 19 C. P. 195. The holders of the receipts made no application for their property, if they had any, within the six months for which, by the statute, the receipts remain in force. Nor do the receipts describe the kind of coal, and there are several kinds, and of different values. Roberts & Co. had the right at any time to go to Coleman's yard, and take their full quantity, because Coleman had wrongfully mixed up Roberts & Co.'s coal with the other coal which was in the yard. And so also could they take, however it was deposited, for they have never parted with their property in it, and no one could make any claim to it against their better title.

Lash, for the Assignee in Insolvency. Sylvester & Hickman had no possession of the yard or of the coal. They had only the lease assigned to them. Coleman was in possession of the yard and coal, and of all the carts, and he hired the men. He was the only occupant. The others were warehousemen, nominally for the accommodation of Coleman. As Coleman was the only person in possession, his endorsement of the two receipts to Sylvester & Hickman, who had given them, gave the latter no property in the coal. The transaction was not within the Warehouse Receipt Act. And it was void as respects the chattel Mortgage Act, for Coleman was all the time the person in possession. The receipt which Coleman endorsed to Cockburn for 400 tons of coal, gave the endorsee no right to the coal. He never made an advance to Coleman, nor did he discount any of Coleman's paper. He only accepted Coleman's draft upon him, and he was therefore no creditor of Coleman at the time he got the warehouse receipt. So also as to the first receipt of the 28th of May, 1874, for 500 tons, which Coleman endorsed to Sylvester & Hickman, that was in security for their endorsement of Coleman's draft on Crawford & Son for \$3,000. In this case, too, there was no debt due by Coleman to them at the time. It is said they had afterwards to arrange the debt with the bank, as the drawers would not accept. The

other receipt of the 28th of May, for 200 tons, was given by Coleman back to Sylvester & Hickman for the carriage of a cargo of coal from Cleveland to Kingston, amounting to \$900. Coleman had first given them a check for the amount. It was not paid, and then he handed them this receipt. He had, of course, got it originally from them. He had used it in the course of his business, and then, by way of securing them for their freight, he, having got back the receipt from some one, gave it over to Sylvester & Hickman. That receipt had answered its original purpose and was of no use to them. The receipt of the 4th of July, 1874, given to Smith for 500 tons, was given by Coleman to him for a note which Smith made for \$2,900 for Coleman's accommodation. That was not an advance nor a discount, but simply the use of Smith's name—such a case is not within the statute. These four receipts make 1,600 tons. The remaining 1,100 tons, contained in two receipts of the 23rd of July, 1874, one for 400 tons, the other for 700 tons, were given to C. R. Chisholm. There was no explanation shewing how or for what Chisholm got them. He makes no claim in this present proceeding for them. He did not appear in the Court below to make good his claim. It is said he intends to look to Sylvester & Hickman personally for his demand. The whole receipts have now been considered, and if no right can be established against the insolvent estate in respect of them, the whole case of the appellants is answered, excepting his commission, but he makes no claim for that if the receipts cannot be supported. The receipts are invalid on their face also, because they name no owner of the goods, and therefore no one competent to endorse or to receive the property, and so no property ever passed: *Llado v. Morgan*, 23 C. P. 517. This proceeding is in the nature of replevin or trover under section 50 of the Act. The assignee disputes only the claims of Sylvester & Hickman and of the holders of the receipts to the possession of the goods. He does not dispute the claims of Roberts & Co. as settled in the Court below.

Harrison, Q.C., in reply. It is agreed that this is in the nature of a possessory action: *Holton v. Sanson*, 11 C. P. 606. As to Roberts's coal, he is entitled at most to only 1,200 tons, if he ought to have any, against Sylvester & Hickman. If the Factors' Act apply against him, and section 13 shews that it does, he is not entitled to claim it as against Sylvester & Hickman: *Baines v. Swainson*, 4 B. & S. 270. It must be shewn that those persons made an advance who held the receipts; and if the acceptances, or making of notes or endorsements, be not an advance, they became such, at all events, when the parties had to provide for the paper they had put their names upon for Coleman, as they had ultimately to do. The advance need not be contemporaneous with the endorsement of the receipt: *Portalis v. Tetley*, L. R. 5 Eq. 140. The new coal replaced the coal formerly there, and sold out from time to time by the agreement of parties and the custom of trade: *Kirkman v. Shawcross*, 6 T. R. 14. Sylvester & Hickman, besides their connection with Coleman, carried on an independent business of their own as wharfingers and warehousemen in this city, and they had their office at Church street wharf, from which they dated and issued their receipts. They had the legal estate of the coal yard and premises vested in them, and so had possession of the property deposited and kept upon the same. Sylvester & Hickman, besides, had a special claim and lien on the goods, which was strengthened by their legal possession, as assignees of the lease. They had a lien for their commission. They had a lien on 700 tons for their personal liability for Coleman, in respect of which they were to have such security. And they had a lien on the residue of the coal to answer the other outstanding warehouse receipts which they had given to Coleman, and which he had transferred to other persons. For their commission and for their personal debt, secured by the 700 tons, they had the right of lien, whether there was a warehouse receipt or not; so the form of it can, as to these claims, make no difference. As warehousemen can set up the *jus*

terti, which will protect, in this case, the other warehouse receipts—*Thorne v. Tilbury*, 3 H. & N. 534—they can set up their own rights. The statute gives no form of receipt. These receipts shew, in effect, if it be necessary they should, that Coleman was the owner or entitled to deal with the property as owner. They state that the coal was deliverable to the order of Coleman & Co. Coleman's name as a bank endorsement passed the property: *Royal Canadian Bank v. Carruthers*, 29 U. C. R. 283; *Royal Canadian Bank v. Miller*, 29 U. C. R. 266. The six months clause does not apply here, for the coal was demanded by Sylvester & Hickman, and their petition was filed for the recovery of the property within the period of six months from the giving of the receipts. And after possession has been taken by the assignee in insolvency, time does not count against those who have such claims as Sylvester & Hickman: *Archbold on Bankruptcy*, 533. The coal is sufficiently described in the receipts, although the kind or quality is not mentioned. The evidence shews the quality is not usually stated: *Moffatt v. Grand Trunk R. W. Co.*, 15 C. P. 392. As to the rights of third parties, it is no consequence whether the actual possession was with Coleman or Sylvester & Hickman: *Todd v. Liverpool & London Globe Insurance Co.*, 18 C. P. 192. As to the coal in the yard, whether as respects Roberts's coal as parcel of the whole quantity, or by excluding it, the assignee in insolvency can take no more property in the coal than the insolvent himself had. The assignee's title must be both an equitable and a legal one. A legal title alone will not do. Now here if Coleman had the legal title he had not the equitable. He had parted with that to Sylvester & Hickman, and to the other holders of the receipts: Insolvent Act of 1869, sec. 10; *Cole v. North Western Bank*, L. R. 9 C. P. 470. He referred also to *Green v. Farmer*, 4 Burr. 2215; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Hodgson v. Anderson*, 3 B. & C. 842; *Fisher v. Miller*, 1 Bing. 150; *Crowfoot v. Gurney*, 9 Bing. 372; *Ex parte Mackey*, 2 M. D. & D. 136; *Ex parte Barber*, 3 M. D. & D. 174; *Robson's*

Bankruptcy, 2nd ed., 240; *Archbold's Bankruptcy*, vol. i., (ed. of 1869), 320, 323; 31 Vic., ch. 11, sec. 7, D.

June 25, 1875. WILSON, J., delivered the judgment of the Court.

It is clear that the legal estate of the coal yard and premises was vested in Sylvester & Hickman as the assignees in law of Coleman; and that it was so transferred to them to enable them to grant warehouse receipts as the legal holders of the premises, to Coleman for the coal which he had deposited and was to deposit and did deposit upon the premises. Coleman's possession of the premises continued the same after as before such assignment. His business sign continued up. He brought in and took out coal just as he liked, and generally he dealt as well with the yard as with the coal, as he had done before the assignment, so far as the public saw or knew, and he was to pay the rent and taxes as if he were still the legal tenant of the premises.

The only right which Sylvester & Hickman exercised over the demised premises, and the only right apparently which they were to exercise, was the right of entry upon them from time to time to see that there remained in the yard a sufficient quantity of coal to meet the warehouse receipts which they gave to Coleman, and which were then outstanding.

That right they did exercise, and they prevented Coleman upon some occasions from removing more coal from the yard, as they feared he was encroaching upon the quantity they required to be left there to meet the receipts they had given.

Subject to that right and supervision, and subject also to the power conferred upon them by the transfer of the lease to issue warehouse receipts, Coleman was practically and substantially the owner of the leasehold premises, notwithstanding the assignment he had made to them, as much so as he ever was, and that was exactly what the parties contemplated and desired.

As Sylvester & Hickman were the legal owners of the coal yard, they could give warehouse receipts for the property stored there.

If any third person, owner of coal, had deposited it there, Sylvester & Hickman might lawfully have given a warehouse receipt for it.

They had more interest than a mere clerk of the warehouseman has in the goods stored in his employer's premises. The Court of Appeal, by a majority of four to three, held the clerk could not sign a warehouse receipt in his own name to the employer for goods stored by the employer, because the clerk was not a warehouseman: *Todd v. Liverpool & London Globe Insurance Co.*, 20 C. P. 523.

Coleman could have given warehouse receipts for such property to himself, without assigning the lease to Sylvester & Hickman. But it may have been thought better to make the receipts on their face more congruous by having some other person certify that he had received coal in store for the owner than that Coleman should certify he had received coal in store for himself.

There is no formal or legal objection to such an arrangement, although it may be that Coleman himself, notwithstanding his assignment to Sylvester & Hickman, might, looking at all the facts, have been as fully qualified as they were to grant such receipts to himself and to others for coal deposited in the yard.

The form of the receipts was objected to: that they did not state any one to be the owner of the coal, and that they did not specify the kind of coal, while there were several different qualities of coal in the yard of different values according to the quality.

The receipts state that Sylvester & Hickman had "received in store from vessels, deliverable only upon surrender of this receipt duly endorsed and payment of charges, to order of J. T. Coleman & Co." [so many] "tons coal."

The Statute 31 Vic., ch. 11, secs. 7, 9, D., speaks of the receipt

being given to or endorsed by "the owner of or person entitled to receive" the property. These receipts shew the coal was received in store "deliverable to the order of J. T. Coleman & Co.", and they *prima facie* import the coal as the property of Coleman & Co.

They do not shew the coal was received for or from Coleman & Co., but that is of no consequence. The bailee desires to know for or from whom he gets property, that he may know for whom to keep or to whom to deliver it. The person who is to get it is the person entitled to demand it, and such a person on the face of these documents is the owner, and that person is Coleman, because it is deliverable to him.

A promissory note payable to the order of a person makes that person proprietor of the note and of the money secured by it, with a right to transfer his interest in the same.

These receipts would give Coleman or any other person named in them the right to demand such property from Sylvester & Hickman, and to sue for or replevy the same if it were not given up, assuming the property for the present to be sufficiently identified. Delivery to a person is one of the strongest symbols of his right and title to goods as against the person giving it. An engagement to deliver, such as is contained in these receipts, must be equally strong as an admission of such right and title in the person who is to get it.

A bill of lading for delivery of goods to the consignee transfers the property to him. If for delivery to the consignor, he still retains his property in the goods. The receipts are sufficient in that respect upon their face.

As to the description of the goods, the quality of coal is not described.

If a sale were made of so many tons of coal in the yard, and there were several sorts, the purchaser could make it good by taking any quality he found there the property of the vendor. The first act being to be done by him, he would have the election: *Sir Rowland Heyward's Case*, 2 Co., 37 a.

I do not see why a receipt of this kind is not equally good to entitle the endorser or holder of it to take any goods the property of the receiptee which he finds on the premises.

The coal so deposited was not to remain there, but was to be sold and replaced by new purchases. That at common law might, if done with the receiptee's consent, be a sale of the coal so deposited by him and so to be dealt with by the receiptor: *South Australian Insurance Co. v. Randell*, L. R. 3 P. C. 101.

But under our statute it may not be so, for by section 7 of the 31 Vic., ch. 11, D., if grain be deposited it may be converted into flour without prejudice to the receiptee's interest in the goods: so it is provided the goods receipted may "be shipped in any vessel or delivered to any carrier for carriage from any place whatever to any part of the Dominion, or through the same, or on the waters bordering thereon, or from the same to any other place whatever."

There may be a pledge of goods, although they remain in the hands of the pledgor, so long as there is a constructive delivery, and the goods remain with the pledgor by virtue of a contract with him to that effect, which makes the custody of the pledgor that of the pledgee: *Reeve v. Capper*, 5 Bing. N. C. 136; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 52.

The naming of the quality would still not define fully the precise parcel or bulk covered by the description of so many hundred tons, if it were mixed with a larger quantity, any more than the description of a thousand bushels of wheat in a bin containing three times that quantity would define the exact thousand bushels of wheat conveyed. That is an uncertainty inseparable from the working and effect of the warehousing clauses, which permit such goods to be shipped or sent off anywhere, when of course it would be almost impossible in the ordinary course of trade to keep each person's portion of goods separate by itself in all the changes they must pass through on the way to market.

That there may be a difficulty in two or more holders of

receipts taking possession of their special allotments, will apply as well where the quality is expressed as where it is not, for there may be two or more pledgees of the same kind or quality; but the rule is, where anything is to be made certain by election, and two or more have to elect separately, he who elects first holds what he has got—"When election is given to several persons, there the first election made by any of the parties shall stand": *Sir Rowland Heyward's Case*, 2 Co. 37 a.

"As if a man makes a lease for life of two acres, the remainder of one acre to I. S., and of the other acre to I. N., he who first makes election shall enjoy the one acre, and thereby the other acre hath vested in the other:" *Ib.* 2 Co. 36 b.

In *Vin. Abr. Election C. pl. 7*, it is said, "In case of two grantees the *first named* shall have election: *Mo.* 85 pl. 215; *E. T.* 7 *Eliz. C. B.*"

Whether property so generally described as it usually is in warehouse receipts, would be a "sufficient and full description thereof, that the same may be thereby readily and easily known and distinguished" under the Consol. Stat. U. C., ch. 45, sec. 6, may be a question which may require some day to be settled.

If the best description be given of the property which the nature of it will permit, it may be deemed sufficient, and it may be considered "to be readily and easily known" if the purchaser or mortgagee of it can get any property corresponding with it, in like manner as the original owner could have done if he had called for the return of his property from the warehouseman.

We think the receipts are not objectionable in form, nor defective for not identifying the specific property covered by the receipts or deliverable under them.

It was next argued that the receipts to Cockburn and Smith, and those held by the appellants, and also by Chisholm, were invalid, however good in other respects, because they were given to these parties not for advances nor for debts under the statute.

We desire to call attention to the fact that there is no execution creditor nor purchaser intervening here, or whose rights are affected, whatever effect that might have had if it had been so.

The Act, 31 Vic. ch. 11, D., speaks of goods transferred to any "bank in this Dominion, or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business or any debt due to such private person or persons": sec. 7. "And no transfer of any such bill of lading, specification of timber or receipt, shall be made under this Act to secure the payment of any bill, note or debt, unless such bill, note or debt be negotiated or contracted at the same time with the endorsement of such bill of lading, specification of timber, or receipt": Sec. 8.

Cockburn said: "I received the warehouse receipt from Coleman on June 29th, 1874, at the time I accepted the drafts."

They were accommodation bills. The receipt was not given to the bank, nor to any person for the bank, nor for any debt due to Cockburn, and no debt was contracted at the same time as the endorsement of the receipt, unless it can be said that the giving of the accommodation acceptances by Cockburn made Coleman his debtor in respect of them.

If Cockburn had given his promissory note to Coleman instead of these acceptances, and Coleman had given back his promissory note to Cockburn for the like amount, could Coleman have been called Cockburn's debtor?

If he could, the mere fact that all the transaction between them is on the one paper, besides the implied engagement of Coleman to repay him whatever he has to pay for Coleman, should not be allowed to make any difference.

It is said, where A. gave his accommodation acceptance to B., which B. gave to C. in exchange for C.'s accommodation acceptance, and before the bills became due, all three parties

became bankrupt, that C.'s acceptance was a sufficient consideration to enable his assignees to prove the bill accepted by A. against his estate; but the dividends were retained until the state of the mutual accounts was ascertained: *Ex parte Solarte*, 1 M. & Ayr. R. 270, 3 Dea. & C. 419.

Smith's dealing was somewhat like the preceding account of Cockburn's dealings. He gave his note on 4th July, 1874, payable to Coleman & Co., for \$2,972. The note was ante-dated to 15th June, 1874. On the 4th of July, 1874, Coleman endorsed the warehouse receipt to him on that day "to secure Smith for the due payment of the said note by Coleman & Co."

As to the appellants' receipts. The one for 500 tons, 28th May, 1874, was given on the day the appellants endorsed Coleman's draft on Crawford & Son for \$3,000. The other receipt, for 200 tons, dated the same day, was not given until after several of Coleman's checks for \$900 had been refused payment at the bank. Then the appellants applied to Coleman for security, and he gave the last named receipt. It was one which had been used before, and had been returned to Coleman, and re-issued by him.

This last one was not given when the debt was contracted.

We know nothing of Chisholm's receipts excepting that they were said to have been given for accommodation paper to Coleman.

These accommodation claims might probably have been proved as debts under the Insolvent Act, and they are claims for which the persons giving them could have required and rightly taken security to indemnify themselves against the chance of having to pay them. The accommodations given do not in the strict sense seem to be properly, within the Warehousing Act, debts due by the insolvent to these parties.

If the warehouse receipts had been endorsed to the banks at the time of the respective discounts, all parties would have been right, as well the accommodation parties as the banks.

I have had much doubt on this point. My opinion was

more in favour of such claims being a debt within the Act than the contrary, and I was glad to find the authority of Page Wood, V.C., in support of it in a case under the Factors' Acts.

In *Macnee v. Gorst*, L. R. 4 Eq. 315, he says, at p. 321 : "I think it would be imputing a very narrow view to the framers of the statutes if I were to hold that, because where a man has become surety for another there is no debt from the principal to the surety until the principal has made default and the surety has been called upon to pay, therefore, if the surety relieves himself of the liability by paying the debt, such a payment is not in respect of an antecedent debt, and that a pledge of goods, given by the principal to the surety to obtain such a payment, will be protected by the Factors' Acts."

We have therefore come at last to the conclusion that the receipts were given to secure transactions which were covered by and are within the terms of the Warehousing Act.

But even if that were not so it would not decide the case, for the question would still be, had the appellants in their own right, and as representing the holders of these documents, if the receipts are not strictly regular by the statute, any specific lien or claim upon the coal in the yard, or upon any and what part of it, for their own commission, and to meet the receipts which are outstanding against them ?

The Insolvent Act of 1869, sec. 10, declares that the assignment shall be held to convey and vest in the interim assignee "the books of account of the insolvent, all vouchers, accounts, letters, and other papers and documents relating to his business, all moneys and negotiable papers, stocks, bonds, and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and movable and immovable property, debts, assets, and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as

* are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided;
 * * Provided always, that no pledgee of any of the effects of the insolvent, or any other party in possession thereof with a lien thereon, shall be deprived of the possession thereof, without payment of the amount legally chargeable as a preferential claim upon such effects; except in the case of * * such pledgee or party in possession proving his claim against the estate and putting a value on his security."

This clause authorizes the assignee to claim and take possession of all the insolvent's estate and effects, excepting when a pledgee or other person is in possession of some part of the estate with a lien thereon. In such a case such person so in possession is not to be deprived of it without payment of his claim.

It does not, however, pass to the assignee any property which was not the property of the insolvent, nor any greater estate or interest in his property than he himself had in it.

An equitable mortgage, good as against the insolvent, would be good against his assignee in insolvency, and so also would an equitable assignment of a debt or other appropriation of his estate good against him be good also against his assignee in insolvency.

There are numerous cases to that effect. When Coleman made an assignment he had in fact appropriated or charged so much of the coal in his yard as was specified in these warehouse receipts, and he did so with the consent of the appellants, so far as that is necessary, because they gave the receipts at his request.

If, instead of resorting to these receipts, Coleman had gone to Smith, one of his accommodation friends, and asked him to make a note for his use for \$3,000, and Smith had said, "I will do so upon you giving me security, or a pledge upon so much coal in your yard, to indemnify me in case I am called upon to pay the note," and Coleman had agreed to do it; and he thereupon wrote a letter to

the appellants desiring them to retain so much coal for Smith's security against the accommodation note, and the letter was delivered to the appellants, and they assented to it; or, instead of writing to the appellants, that he thereupon charged to and in Smith's favour so much of the coal in his yard for the purpose of the note—that would be a good security upon the coal, and that is exactly what he did do in his dealing with Smith.

By the English Bankruptcy Acts there has always been a clause in them subjecting property “in the possession order and disposition” of the bankrupt to the payment of his general debts against the claim or title of the true owner of them.

Under that clause the registration of a bill of sale has no operation whatever if the vendor or mortgagor be allowed, although by the terms of the deed, to remain in possession; he is in such a case in possession as apparent or reputed owner, with the consent of the other: *Stansfeld v. Cubitt*, 2 DeG. & J. 222; *Badger v. Shaw*, 2 E. & E. 472; *Ashton v. Blackshaw*, L. R. 9 Eq. 510; see *Ex parte Homan, In re Broadbent*, L. R. 12 Eq. 598.

We have no such clause in our Insolvency Act. The assignee under it takes just what is the property of the insolvent—that is, such property as he has a legal and equitable title to; or, what is in effect in many cases the same, he takes the debtor's property, subject to all legal and equitable claims upon it.

A bill of sale, filed or not filed, is a legal charge upon the property, and good as against the insolvent, and good therefore as against his assignee, who takes no more than the insolvent himself had or has a title to.

Smith had, in fact, by the letter of the 4th of July, 1874, signed by Coleman, an equitable if not a legal charge upon the quantity of coal specified, and it appears to me all the other holders of warehouse receipts had so also; and the appellants had too, for the receipts which they had granted, and for the obligations which they had come under in respect of them.

It was expressly agreed between the appellants and the insolvent that for all the coal charged with receipts which Coleman took out, he should replace with other coal in lieu of it. There was nothing as between themselves to hinder them from making such an arrangement, and so far as the assignee is concerned, he must be bound by it.

If a trader request his debtor to pay the debt to a creditor of the trader, which the debtor agrees to do as soon as it is ascertained, and after it is ascertained, but before payment, the trader becomes bankrupt, the debt belongs to the creditor as the equitable assignee of it: *Crawford v. Gurney*, 9 Bing. 372; *Ex parte Steward, Re Blake*, 7 Jur. 116; *Walker v. Rostron*, 9 M. & W. 411.

Property deposited to pay drafts, or a bill remitted to an agent to pay him for goods bought for his principal, are held to be appropriated to these particular purposes, and will not pass to the assignee in bankruptcy: *Cazenove v. Prevost*, 5 B. & Al. 70; *Pennell v. Alexander*, 3 E. & B. 283.

So money paid by a person to his accommodation acceptor, to take up a bill, cannot be recalled. It has been appropriated, and it will not pass to the assignee in bankruptcy: *Yates v. Hoppe*, 9 C. B. 541.

The purchaser of goods, by lodging a delivery order with the wharfinger who has them, vests the property in himself as against the assignee in bankruptcy of the vendor; *Tucker v. Ruston*, 2 C. & P. 86.

So the delivery of an unendorsed bill of lading for advances made will protect the property for such person: *Meyer v. Sharpe*, 5 Taunt 74.

Goods with the maker of them, sent by him to another to keep for the owner, although sent without the owner's knowledge, will vest the possession in the owner and divest it from the other, so as to prevent the goods from passing to the assignee of the person who so handed the goods over: *Wilkins v. Bromhead*, 6 M. & G. 963.

So notice of a transfer of debt, given to the liquidator of the debtor, will create an equitable assignment of it in

favour of the creditor, although he knew nothing of the assignment at the time: *In re Breech Loading Armoury Co.*, L. R. 5 Eq. 284.

I am of opinion the appellants are entitled to the possession of the coal in question to the extent of the documents called warehouse receipts outstanding, and for their commission, unless so far as the rights of Roberts & Co. may be held to interfere with the claim of the appellants.

And as to that portion of the coal, there is no question that Roberts & Co. sent the coal to the insolvent to be sold by him on commission, and there is no doubt that in such a case such coal will not pass to the assignee; the order and disposition clause of the English Act not being in force here. There is no doubt either that the right to sell on commission will constitute the person having such right and the actual possession of the goods, a person within the operation of the Factors' Act, Consol. Stat. C., ch. 59.

Under that Act any agent entrusted with the possession of goods or of the documents of title thereto shall be deemed the owner thereof, for, among other purposes, to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made with such agent, as well for an original loan advance or payment made upon the security of the goods or documents, as for any further or continuing advance in respect thereof—sec. 2, sub-sec. 3; and every payment, whether made by money, bills of exchange, or other negotiable security shall be deemed an advance within this Act: sec. 12.

Here, in every case, there was "an advance," because the payment was made by bills of exchange or other negotiable security.

When Smith gave his promissory note to Coleman, that was a payment under this Act, and when the appellants accepted for Coleman that also was a payment under the Act.

The only difficulty in the way here is, that all these receipts were issued and outstanding before any of Roberts

& Co.'s coal was deposited in the yard. It was in no other way pledged by Coleman than by his anterior agreement with the appellants that such of the coal as he took from the yard from time to time, both before and after some of Roberts's coal came in, was to be replaced by other coal as it afterwards came in, and Roberts's coal was that which chiefly afterwards came in.

It is said, therefore, that their coal was never specially pledged, and that Coleman had no right to appropriate Roberts's coal, one customer's coal, in making up the deficiencies of another person's coal. Grain and flour are stored, and the customer is to withdraw portions of it from time to time, and to replace it with other grain and flour; and the grain or flour of different customers is usually put together, so that—as to grain, at any rate—the original specific portion of one person cannot be identified as his, or be distinguished from that of any other person whose property is put with it. And it is not intended by such storers that they shall receive their identical grain or flour back again; but that any grain or flour of the like quantity and quality will be considered a due delivery to them of their property. It is in that respect like the deposit of money in a bank. No one gets back the coin or bills he deposited, but an equivalent only in other coin and bills.

There was not properly a pledge as between Coleman and the appellants for an antecedent debt of Coleman's. It was more properly the restitution of other property of the like kind for that which had been removed, and which it was agreed beforehand should be put in its place, and be charged with the like claims which the property it replaced was subject to, in consideration of letting that other property be removed from the operation of such charges, and be put upon the market.

The case of *Portalis v. Tetley*, L. R. 5 Eq. 140, may be said to be to some extent in favour of that being done. But that was not a case of substitution of property. It is observed upon in *Cole v. North Western Bank*, L. R. 9 C. P. 470, at pp. 486, 488, 497.

In *Meyer v. Sharpe*, 5 Taunt. 74, the goods were taken away by an agent of the owner, but without the owner's consent, and they were replaced by the agent at the owner's desire, but after an act of bankruptcy by the owner, so they could not pass to the pawnee of the former goods, but were held to be the property of the owner and to vest in his assignees in bankruptcy.

Gibbs, J., said, at p. 80: "If in any of Grant's (the owner's) letters there had been any word of his pledging the cargo, be it what it might, I should have thought that the equitable assignment would have taken place; but there is no foundation for that, and if Grant not only did not know that any of the goods would be taken out, and others put in their place, but did not provide for any such case, it would be too much to say that, when the case occurred, those other goods could pass by the original transfer."

We see difficulty in the way of a decision which ever way it may be. If the property of Roberts can be taken to furnish the receipts to holders who got their title upon and to other goods, it is in effect taking one man's goods to pay another man's debt. It is very much, too, like paying an antecedent debt of Coleman's, so far as Roberts & Co. are concerned.

If such property cannot be so appropriated, or cannot when received be safely parted with or changed, to be supplied again at a future day, it may cramp the transferability and use of these warehouse receipts, and the dealing with property covered by them, as such property is dealt with now according to the custom of trade and business.

Certainly such newly sent property may be seized and sold for arrears of rent and taxes due before it was delivered at all. That may be no argument for extending the like case to other cases.

Here there was no advance made on this coal specially, nor while it was in the yard. Nor was there an advance made to be covered by this coal when it arrived. The implied contract was, that if the coal in the yard when the receipts were given was disposed of there would be other

coal subsequently placed there to fill its place. As between the actual owner, if he made the contract of that kind, and the receipt holders, there would be no difficulty, but there was no such actual contract made in this case between Roberts & Co. and the receipt holders, nor any implied contract either. Roberts & Co. did not think or suppose their coal would be liable to be appropriated in such a manner, nor that according to usage or custom of trade it could be so appropriated.

Then there is this further difficulty. If the appellants are to be considered as the warehousemen, they are in the same position as Coleman towards Roberts & Co., and their personal rights must be considered in the same light as Coleman's would be if he, as the factor, had himself given the warehouse receipts and were setting them up against his own principals Roberts & Co., and as against them Coleman's act would be a criminal one by the statute. But could Coleman be convicted if he had made these receipts, creating a pledge, &c., of any goods so entrusted to him without authority for his own benefit, or any contract to deliver such goods, if all he did was, to issue receipts on property which he formerly had and which was not that of Roberts & Co., and agreed to hold this after-acquired property sent to him on commission by Roberts & Co., subject to those receipts in lieu of the other property? I am disposed to think he could not be convicted in such a case; and that is just the very point under consideration.

A warehouse receipt, like every other document of title, must bind or apply to some specific property. If any of that property be removed and other property substituted for that taken, the new property must come in under a new contract to that effect, or under the original contract, which must have been made extensive enough to cover it.

Then was such a contract good as between Coleman and the appellants, if Coleman had been the owner of the coal? There is no reason why it should not be good.

The cases of *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Reeve v. Whitmore*, 9 Jur. N. S. 1214; *Brown v. Bateman*, L. R. 2 C. P. 272, and many others, might be referred to in support of it.

But when the coal of Roberts & Co. came into the yard the debts had been long contracted between Coleman and the receipt holders. Coleman was not the owner of the coal, and he could not under the Factors Act, for these antecedent debts give another person's coal in pledge, nor could he contract beforehand to do so in consideration of being permitted to remove a part of the coal which had been before rightfully pledged as his own, or had been lawfully pledged by virtue of the statute so as to be binding on the true owner.

I am of opinion Roberts & Co. are entitled to recover their coal, or the portion of it which remained unsold by Coleman, which is either about 1,240 or about 300 tons less, with respect to which the parties are not agreed. If the parties cannot settle that matter between themselves, I shall hear them, and determine it.

The appeal will be disposed of as follows: The coal of Roberts & Co. unsold, and so far as it can identified, will be given up by the assignee in insolvency to Roberts & Co. or their authorized agents. The residue of the coal, to the extent of 2,700 tons, will be given up by the assignee to the appellants; and the order of the learned Judge of the County Court will be altered, so as to give effect to the order which we now make.

The costs of this proceeding on both sides we direct shall be paid from the estate.

Judgment accordingly.

LEWIS ET AL. V. MASON.

Stoppage in transitu—Goods in bond.

The goods in question were purchased by M., in Hamilton, from the agent there of the plaintiffs, who lived in Montreal, at four months' credit. They were delivered by the plaintiffs in bond at the railway station in Montreal consigned to M., and arrived in Hamilton on the 16th February, 1874, where they were placed in the customs warehouse at the railway company's freight shed. M. was advised on the following day of their arrival there, but allowed them to remain, and no entry was made or duties paid before the 23rd May, when the plaintiffs gave notice of stoppage in transitu, M. having become insolvent. M. had accepted the plaintiffs' draft for the price, due on the 14th June, which they had discounted at the bank, but they took it up at maturity, and produced it at the trial.

Held, that the transitus was not at an end: that the right to stop existed; and that the plaintiffs therefore were entitled to the goods as against M.'s assignee.

INTERPLEADER issue. The plaintiffs affirmed that five hogsheads of brandy, then in the possession of the Great Western R. W. Co., and referred to in the interpleader order, dated 13th of October, 1874, were the property of William F. Lewis, George L. Lewis and John L. Lewis, as against John James Mason, as assignee of the estate of C. W. Mugridge.

The issue was tried before Patterson, J., at the Fall Assizes, 1874, at Hamilton, without a jury, when a verdict was entered for the claimant.

The brandy in question was bought by C. W. Mugridge, who lived in Hamilton, from the claimants' agent in Hamilton, the claimants' place of business being in Montreal, on the 11th February, 1874, at four months' credit. According to an advice note from the Great Western R. W. Co., dated Hamilton, 17th February, Mugridge was advised that the goods had arrived there in bond on that day. They wished him to send for them as soon as possible, as they remained at his risk and expense under the conditions stated on the back of the advice note.

The condition referred to was the 14th, as follows: "The delivery of the goods will be considered complete, and the responsibilities of the company will be considered to

terminate when placed in the company's shed or warehouse, when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk and expense * * * That in the event of the company being unable to store and warehouse goods received by them, it shall be lawful for them to place the same in any warehouse of any wharfinger or warehouse man that may be available, at the risk and expense of the owner of the property so stored, and the charges of warehousing and conveyance shall form an additional lien upon said goods."

According to the admissions made at the trial, it appeared that the goods were delivered by the claimants in bond at the Grand Trunk Railway station in Montreal, consigned to Mugridge, at Hamilton, and arrived at the Great Western Railway station in Hamilton, on the 16th of February, 1874, and were then placed in the bonded department of the Great Western freight shed.

On the 25th of February, the claimants wrote to Mugridge enclosing an account charging him as of date of 11th of February to goods at four months, \$477.04, and a letter stating that: "Requiring to provide a very large amount of exchange for Europe, we have taken the liberty of drawing for above amount at four months, from 11th inst. Please honour draft on presentation, and oblige.

W. F. LEWIS & Co."

The draft endorsed by the claimants was presented to Mugridge on the 2nd of March, and accepted by him, payable in the body at the Bank of Montreal at Hamilton. The bill matured on the 14th of June, and was dishonoured. On the 23rd of May, 1874, the claimants gave notice both to the Railway Company and the Collector of Customs at Hamilton that they claimed the five hogsheads of brandy lying in the Customs Warehouse at the freight shed at the Great Western Railway station, in that city, consigned to C. W. Mugridge, and they notified both the Collector and the company (the notices were separate and addressed to each), not to deliver the same to Mugridge or his assignee

in insolvency, as they claimed the right to stop the property in transitu.

It was also admitted that on the 23rd of May, Mugridge was insolvent and unable to pay his debts. On the 27th of May, Mugridge made a voluntary assignment in insolvency, and the defendant was the assignee, duly appointed under the statute.

The goods on their arrival at Hamilton were placed in the Customs Warehouse at the Great Western station, and had remained there ever since. The goods prior to the notice served on the Collector, on the 23rd of May, had not been entered or duties paid, nor had any permit been granted in respect of them. After the 23rd of May the claimants' agent applied to have the goods transferred in bond to Montreal.

Mugridge said he supposed the goods were warehoused for him by the railway company; he had no bonded warehouse, and he allowed them to remain in the bonded warehouse of the company. He presumed they held them for him. It suited his convenience to have them remain there. He made no arrangement with the railway company to store the goods, he merely allowed them to remain.

The freight agent of the railway said the practice as to goods sent forward in bond was, that the consignee is advised, and the goods remain in the bonded warehouse till the Custom House authorities declare them clear, and the consignee requires a delivery. They hold them for the consignee, and claim storage from the time they send the advice note. Goods coming free they deliver at once.

On cross-examination he said: the company do not act as warehousemen in the ordinary meaning of the word, but only for the convenience of customers. The goods are under lock and key of the Customs, but in the warehouse of the company.

There was some evidence offered as to an offer made by the plaintiffs' agent to the bookkeeper of *Mugridge* to give ten cents a gallon if he would return the brandy.

The evidence tended to shew that at the time of

Mugridge's insolvency, and when the notice was given to stop the delivery of the goods, and also when Mugridge made his assignment, the acceptance was in the hands of the bank, where it had been discounted, but it was at maturity taken up by the plaintiffs, who produced it at the trial.

There was no evidence given to shew that Mugridge or his assignee ever applied to the Railway Company or the Customs House Officer for the brandy, or offered to pay the duties to get possession of it. When the interpleader order was granted in this matter in October, it was long after the acceptance had matured, which was in June.

The following is the note of the learned Judge before whom the case was tried, without a jury, in deciding the matter. The question whether the transitus was ended was concluded by the cases of *Northey v. Field*, 2 Esp. 613, and *Burr v. Wilson*, 13 U. C. R. 478, which were not distinguishable from the present case. In the former, Lord Kenyon held the bankrupt had no actual possession till the duties were paid. Until then the goods were *quasi in custodia legis*. The defendant, however, contends that the plaintiffs lost the right to stop in transitu by their agent's recognition of the insolvent's title to the goods by offering to repurchase them at an advance, and by their own recognition of the insolvent's title by drawing for the price and obtaining the acceptance of the insolvent after the arrival of the goods in Hamilton, and by negotiating the bill, which was out of the plaintiffs' hands at the time they claimed the right to stop the goods. If necessary to decide as to the fact of an offer to repurchase having been made by the plaintiffs or their agent, I., would decide no such offer was made. But if made, it could not be material. It could not estop the plaintiffs in any way, and it would not be even a recognition of any property in the insolvent inconsistent with the plaintiffs' right to stop in transitu. When the goods were delivered to the carrier at Montreal they undoubtedly became the property of the insolvent, and the plaintiffs parting with

the possession lost their lien at law for the purchase money. The right to stop in transitu,—which is said to be an equitable right in the nature of an equitable lien (*Schotsmans v. Lancashire and Yorkshire R. W. Co.*, 2 L. R. Ch. 332, 334,)—enables the plaintiffs to regain possession, and so to restore their lien at law, apparently leaving the contract of sale unrestricted. See the cases referred to in *Benjamin on Sales*, 2nd ed., pp. 723-4-5. I am satisfied the bill was drawn, accepted, negotiated, and outstanding, as contended for by the defendant. I do not find as a fact that there was no agreement to accept or that the insolvent accepted at the plaintiffs' request, and to oblige the plaintiffs by enabling them to discount the paper. Assuming, however, that all this was as defendant contends, the transaction, so far as it amounts to a recognition of the insolvent's property in the goods, is, for the reasons already given, in no way inconsistent with the right of the stoppage in transitu. The taking of a bill or acceptance for the price, clearly does not destroy the right: *Feise v. Wray*, 3 East 93; *Jenkyns v. Usborne*, 7 M. & G. 678; *Edwards v. Brewer*, 2 M. & W. 375. I have not seen any authority, and I do not see any grounds, for holding that the negotiating of the bill had any such effect. The decision in *Edwards v. Brewer*, that it is not necessary to return or tender the bill before exercising the right in question, is an authority to the contrary." He therefore entered a verdict for the plaintiffs.

In Michaelmas term, November 28, 1874, *MacKelcan* obtained a rule *nisi* to set aside the verdict, and enter a verdict for the defendant on the law and evidence.

In Easter term last, *Harrison*, Q.C., shewed cause. The goods, being in bond, have never been in the possession, actual or constructive, of the consignee; the transitus, therefore, was not at an end, and the seller could properly obtain his lien on the goods by giving notice not to deliver to the consignee on the insolvency of the latter: *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, referred to in *Abbott on*

Shipping, 11th ed., 439; *Burr v. Wilson*, 13 U. C. R. 478; *Howell v. Alport*, 12 C. P. 375. The two latter cases are express authorities in favour of the plaintiffs. The fact that the consignee had accepted a bill of exchange for the amount of the invoice cannot interfere with the right of the unpaid seller to stop on the bankruptcy of the consignee: *Frise v. Wray*, 3 East 93; *Patten v. Thompson*, 5 M. & S. 350; *Jenkyins v. Usborne*, 7 M. & G. 678; *Edwards v. Brewer*, 2 M. & W. 375; *Schotsmans v. Lancashire and Yorkshire R. W. Co.*, L. R. 2 Ch. 334; *Benjamin on Sales*, 693, 723-4-5; *Lackington v. Atherton*, 7 M. & G. 360; *Fraser v. Witt*, L. R. 7 Eq. 64; *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431; *Coventry v. Gladstone*, L. R. 6 Eq. 44; Dominion Customs Act, 31 Vic. ch. 6, sec. 13, sub-sec. 3, sec. 54, sec. 55, sub-secs. 2, 3, 6, sec. 56, sec. 60, sub-secs. 2, 3, sec. 63, sec. 123, sub-secs. 4, 8, 9, Here the goods remained just as they were when received from Montreal. The consignee did nothing, did not pay the duties, or give a new bond, or have any entry in the Custom House books as to changing the character in which the goods were held. The case, therefore, is distinguishable from the case referred to by the Chancellor, in *Mottram v. Heyer*, 5 Denio 631, or *Strachan v. Knox*, referred to in *Bell's Commentaries*, 5th ed., vol. 1, p. 173.

C. Robinson, Q.C., contra. The delivery was complete when the goods were deposited in the warehouse: *Heinekey v. Earl*, 8 E. & B. 410, 424. The transitus was to be considered at an end so far as the railway were concerned: *Bowie v. Buffalo, Brantford and Goderich R. W. Co.*, 7 C. P. 191; *O'Neill v. Great Western R. W. Co.*, Ib. 203; *Inman v. Buffalo and Lake Huron R. W. Co.*, Ib. 325. The judgment of Chancellor Walworth in *Mottram v. Heyer*, 5 Denio, at p. 632, approving of the doctrine in *Strachan v. Knox*, seems to lay down the correct rule, that the bonded warehouse is the warehouse of the consignee, and therefore the transitus is at an end. It would be a very inconvenient rule to establish that goods purchased by a merchant, lying in bonded warehouses, are liable to be stopped in transitu

until paid for. Much of the stock-in-trade of many of the the merchants in the larger towns and cities is so deposited, and when any one of them becomes insolvent, if a creditor, who can trace goods he has sold to the bonded warehouse, may hold them until he is paid, no matter how long they have been there, such creditor has an advantage over the general body of creditors. *Don v. Law*, 12 C. P. 460, seems to decide that goods in transitu, when seized under an execution against the consignee, cannot be retained for the unpaid purchase money. *Burr v. Wilson*, 13 U. C. R. 478, is certainly a strong authority against the defendant. There, however, the bill which was given for the purchase of the goods was dishonoured and in the hands of the vendor when the goods were stopped. He also cited *Benjamin* on Sales, 2nd ed. 693; *Parsons* on Admiralty and Shipping, vol. i., 497, note 1 referring to *Strachan v. Knox*, 19 F. C. 253; *Donath v. Broomhead*, 7 Barr 301; *Parsons* on Contracts, vol. i., 603. The carrier claiming to hold for a lien on the goods does not continue the transitus so as to enable the seller to stop for unpaid purchase money: *Allan v. Gripper*, 2 Cr. & J. 218.

June 19, 1875. RICHARDS, C. J., delivered the judgment of the Court.

The following are the clauses of the Customs Act of 1867 referred to on the argument:—

Customs Act of 1867, 31 Vic., ch. 6, sec. 13, sub-sec. 3
 “Unless the goods are to be warehoused in the manner by this Act provided, such person (the person entering them) shall at the same time pay down all duties due upon all goods entered inwards; and the collector * * shall * * grant his warrant for unlading * * such goods, and grant a permit for the conveyance of the same further into Canada, if so required by the importer.”

Sub-sec. 4. “In default of such entry * * or payment of duty * * the officer of customs may convey the goods to the customs warehouse; and if * * not duly entered for consumption or for warehousing within one

month * * the goods shall be sold by public auction, * * and the proceeds thereof shall be applied, first, to the payment of duties and charges, and the overplus * * after discharging the vessel's lien shall be paid to the owner of the goods."

Sec. 54 names the warehousing ports, amongst them Montreal and Toronto.

Sec. 55. "The importer * * may enter the same for exportation, on giving such security * * for the exportation of the same goods,—or may warehouse the same on giving such security by his own bond for the payment of the amount of all duties on such goods, and the performance of all the requirements of the Act with regard to the same, * * at such ports as aforesaid, and in such warehouses, and subject to such rules and regulations, as may be from time to time appointed by the Governor in Council."

Sub-sec. 2. The importer may remove the said goods "under the authority of the said officer, from such warehousing port to any other warehousing port in Canada, under good and sufficient bonds to the satisfaction of such officer."

Sub-sec. 3. "All such goods shall be finally cleared, either for exportation or home consumption, within two years from the date of the first entry and warehousing thereof; and in default thereof, the collector * * may sell such goods, for the payment, first of the duties, and secondly of the warehouse rent and other charges, and the surplus, if any, shall be paid to the owner * * and the collector, * * may charge or authorize the occupier of the warehouse to charge a fair warehouse rent, subject to any regulation made by the Governor in Council."

Sub-sec. 6. "Goods warehoused shall continue to be liable for freight as if on ship board."

Sec. 56. "If any goods entered to be warehoused are not duly carried into and deposited in the warehouse,—or having been so, are afterwards taken out of the warehouse without due entry and clearance * * without the permission

of the proper officers of customs,—such goods shall be forfeited.”

Sec. 57. “All goods taken out of warehouse shall be subject to the duties to which they would be liable if *then* imported into Canada, and not to any other.”

Sec. 60. “The property of any whole package or packages, of any goods so warehoused shall be transferable from party to party on a *bonâ fide* bill of sale by the parties, or executed and delivered by a broker or other person legally authorized for or in behalf of the parties respectively.”

Sub-sec. 2. “Any such sale shall be valid for the purposes of this Act, although the goods remain in the warehouse, provided that a transfer of such goods, according to the sale, is entered and signed by the parties in a book to be kept for that purpose by the collector, * * who shall keep such book and enter such transfers, with the dates thereof, upon application of the owners of the goods, and shall produce such book upon demand.”

Sub-sec. 3. “And upon such sale, the proper officer may admit fresh security to be given by the bond of the new proprietor of the goods, * * and may cancel the bond given by the original bonder of such goods; * * and the party being the proprietor of any such goods for the time being, shall then be deemed to be the importer thereof for the purposes of this Act.”

Sec. 61. “The Governor in Council may, by regulation, authorize such allowance for leakage, * * waste, or deficiency on goods warehoused * * but, except when otherwise provided by such regulations, the duties shall be payable on the quantity originally warehoused.”

Sec. 63. “No parcel of goods shall be taken out of warehouse, whether for consumption or exportation, or removal to some other port, unless the duties thereon amount to the sum of twenty dollars or upwards, or such parcel shall be all the goods remaining in warehouse, and comprised in the same entry for warehousing.”

Sec. 123. “The Governor in Council may, from time to time, * * make regulations for or relating to the follow-

ing purposes and matters: * * Sub-sec. 4. For appointing places and ports of entry, and warehousing and bonding ports * * Sub-sec. 8. For extending * * the time for * * clearing warehoused goods, and for the transport of goods in bond from one port or place to another."

Sub-sec 9. "For regulating the form in which transfers of goods in warehouse or bond from one party to another shall be entered."

31 Vic., ch. 5, sec. 49, D., authorizes the Governor to remit duties in cases of hardship.

These goods, then, being in bond in Montreal and shipped there in bond on the Grand Trunk Railway for Hamilton, were, we assume, either placed in bond in Montreal to be transferred to some other place where there was a bonded warehouse, or after they were placed in the bonded warehouse in Montreal they were, with the permission of the officer of customs, permitted to be removed in bond to Hamilton.

The parties who placed the goods in bond in Montreal under the statute were bound to give, and probably did give, security to the Government for the payment of the duties on these goods. When they came to Hamilton they were placed in the bonded warehouse there, the warehouse being owned by the Great Western Railway; but the goods placed there could not be delivered to any person without the duties being paid, and on that being done a permit would be given to the owner to remove them, and then the railway company would deliver them on payment of their charges.

In this case, then, the railway company, until after the insolvency of Mugridge, were never in a position to deliver the goods to him; they never in fact reached his possession, nor could they be constructively in his possession, for the duties not having been paid they could not be given to him, and therefore the transitus was not at an end.

In *Heinekey v. Earle*, 8 E. & B. 410, at p. 423, Lord Campbell, C.J., discussing the question when goods may be considered to be in transitus said, "A mere delivery at the

place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee; and, although they are landed at the place to which they are destined, I think that, unless the consignee has taken possession of them, they are still in transit, and the consignor, on the insolvency of the consignee, may still exercise his right to stop in transitu. I think it cannot be said that these goods ceased to be in transitu merely because they were put on the premises of Horn, (the consignee) that, I think, would not necessarily be a termination of the transit."

The cases of *Burr v. Wilson*, 13 U. C. R. 478; *Howell v. Alport*, 12 C. P. 375, based on *Northey v. Field*, 2 Esp., and *Nix v. Olive*, *Abbott on Shipping*, 11th ed., 439, well sustain the contention of the plaintiff, that the transitus was not ended when the goods were in the bonded warehouse and Mugridge became insolvent.

As the learned counsel for the defendant has referred to the judgment of the late Chancellor Walworth, an able lawyer, in *Mottram v. Heyer*, reported in 5 Denio 629, 630, where the case was in the Court of Appeals for the State of New York, I have made a lengthened abstract of that case. The doctrine as to stoppage in transitu generally, I believe, is that now approved of by the English Courts.

He says, "The general principles in regard to the right of stoppage in transitu, are now very well settled both here and in England; and the only difficulty is in applying those principles to the facts of the particular cases as they from time to time arise. One of those principles is that, though by the common law a sale of goods may be complete without actual delivery, yet if the purchaser fails after such sale and while the goods remain in the hands of the vendor, or while they are in the hands of a middleman in the course of their transit to the possession of the vendee, the vendor may retain them in his own hands or may stop them in the hands of such middleman, and resume and retain the custody of them until he is paid or

secured for the price of the goods. And this right exists whether the time of the credit which was given has or has not expired, at the time the right to retain the goods or to resume the possession of them by stopping them in transitu is exercised by the vendor, or by his authorized agent. * * Another principle is, that the right to stop in transitu continues not only during the time that the goods remain in the possession of the carrier, either by land or by water, but also while they are in the hands or under the control of a middleman, in a place of deposit connected with the transmission or delivery of them, until they come to the actual or constructive possession of the vendee himself. * * But an actual delivery of the goods to the vendee, or a constructive delivery to him, by a delivery to his agent who is authorized by him to receive the goods as such agent, and not as a mere middleman, puts an end to the vendor's right."

The learned Chancellor then expresses the opinion, in accordance with the doctrine laid down in *Northey v. Field*, and *Nix v. Olive*, that when the goods are in the customs warehouse the transitus is not to be considered as at an end. He then proceeds: "Where goods are placed in the public store under the warehousing system, either in this country, or in England, *after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place where he intends they shall remain until he gives further order for their disposal*; and the law recognises his right to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties, at the time when by law those duties become due and payable. And in such a case I have no doubt that the right of stoppage in transitu should be considered at an end the moment the goods are thus deposited, *after a perfect entry has been made*. This is also in accordance with the decision of the Court Sessions in Scotland in the case of *Strachan v. The Trustees of Knox & Co.* * * There the goods were im-

ported, and were deposited by the consignee in a bonded warehouse, under the provisions of the statute 43 Geo. III., ch. 132, * * And the Court properly decided that the transitus was ended."

As to the person to whom the notice was to be given he said, at p. 634:—"So in *Newhall v. Vargas*, 13 Maine 93, it was decided that a claim made by the vendor, * * upon any person having the charge of the goods before the transit was ended, was a sufficient exercise of the right. But no case has gone so far as to allow a mere notice to the vendee before the goods came to his possession, of the vendor's wish to exercise the right, or a notice of his claim given to any other person not having the custody or control of the goods, to be a good exercise of the right to stop in transitu, * * The only proper way to prevent him (the consignee) receiving them (the goods) is for the vendor or his agent to resume the actual possession of the goods or to give notice of the claim to stop in transitu to some one who has them in custody, *either personally or by his servant*, and to prohibit such custodee from delivering the goods to the vendee until the claim of the vendor for the purchase money is adjusted. * * To make the notice effectual it must be given *either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody*, at such time and under such circumstances that he may with reasonable diligence prevent the delivery of such goods to the vendee."

As the notice in that case was to the consignee himself, who did not get possession of the goods until afterwards, it was held not sufficient. The notice should have been given to the custom house officer having charge of the goods.

I also copy the note of the case of *Strachan v. Knox Co., Trustees*, 21st January, 1817, reported in 19 Faculty Coll. 253, referred to in *Bell's Commentaries*, 5th ed. at p. 173. 174. It is also referred to in *Bell's Illustrations of Principles*, vol. i., p. 388.

"Knox & Co., of Aberdeen ordered from Strachan &

Co., of London, wine in casks, to be sent from Oporto. Strachan's agent at Oporto, shipped the wine for Aberdeen, where, on arrival, it was lodged in the King's cellars, bonded for the duties, in the name of a merchant acting for Knox & Co. While the wine lay thus in bond, and not paid for, Knox & Co. failed. Strachan applied to the sheriff for a warrant to have the wine delivered to him, as stopped in transitu, not yet having reached the hands of the vendee. The sheriff refused his application, and on appealing to the Court of Sessions they, recognizing the distinction stated in the text, held the King's cellar to be the cellar of the person in whose name, and for whose behoof the wines were bonded, and that in this case the delivery to Knox & Co. was complete."

The matter is referred to in the 5th edition of *Bell's Commentaries on the Laws of Scotland*, at p. 175. There it is laid down, that "under the Bonding Acts, the bond warehouse is to be held as the merchant's own warehouse, where his goods lie at his disposal, and into which they may be delivered for his use. A delivery by the seller into the bond warehouse, for behoof of the buyer of goods bonded in the buyer's name, is as effectual a delivery as if made into the buyer's own cellar."

Here, however, there is an obvious distinction. The goods have never really been bonded in the name of the consignee. It may be doubted if the Crown had any remedy against him for the duties. The original bond taken in Montreal was the one, I apprehend, on which the Crown would be obliged to rely for the payment of the duties. But under section 60 of the Customs Act, referred to, sub-sections two and three, if the goods are transferred in the books of the department to a purchaser, and stored there in his name, and he has given security for the payment of the duties, then perhaps the rule referred to in the judgment of Chancellor Walworth and of the Scotch Court might apply. But as at present advised it would not apply to this case, for the goods are not and were not bonded in the consignee's name. The express decisions of

our own Courts apply to this case, and we are, I think, bound by them.

I must confess it seems to me more equitable, where a person in failing circumstances has goods sent to him, in case of his making an assignment when the property has not actually come into his possession, that the unpaid vendor should be allowed to retain the goods until he is paid for them, rather than that they should be applied to pay the general debts that were contracted long before the sale of the goods intended to be retained. It was at one time a rule of the Scotch law that when a purchaser became insolvent within a limited time after goods had reached their destination the seller might retake the goods; a failure so soon after the purchase, apparently whilst the purchaser was insolvent, being considered as evidence of fraud, and justifying the seller in retaking the goods.

I make a short extract from the judgment of Porter, Senator, in the case of *Mottram v. Heyer*, 5 Denio, 637, on this right of stoppage in transitu, as follows:—"If this right of stoppage in transitu is one that deserves to be favoured and encouraged; one that promotes justice and honesty; one that prevents the property of the vendor from being unjustly and often fraudulently appropriated to the payment of a bankrupt's debts, who fails before the goods reach him; I think we should not give a latitudinary construction to pretended or constructive acts of ownership; but that we should hold that the goods must come into the actual possession or under the control of the purchaser, his agent or servant, before the right of stoppage shall be at an end."

The nature of this right is not like an ordinary lien, for there, if the seller parts with the possession of the property, the lien is gone. It was at one time thought that the stopping in transitu rescinded the contract, but the later cases seem to hold that the claim which the vendor has is in the nature of a lien for the unpaid purchase money.

The present Chancellor, Lord Cairns, when sitting as Lord Justice, in *Schotsmans v. Lancashire & Yorkshire R. W. Co.*,

L. R. 2 Ch., 332, at p. 340, thus states the position of the unpaid vendor, who has stopped the goods *in transitu*: "He has revested in himself the legal title to these goods; but he holds this title merely as a security for the price of the goods, and liable to be called on to surrender it on payment of the price; he is therefore an incumbrancer only, or a person having, what Lord Kenyon in *Hodgson v. Loy*, 7 T. R. 445, described as a kind of equitable lien for the price of the goods, which lien or incumbrance he is entitled to realize." That the third person is an agent holding them merely for the person who is owner subject to the lien.

In *Bolton v. The Yorkshire and Lancashire R. W. Co.*, L. R. 1. C. P. 431, Willes, J., said, at p. 439: "The right to stop in transitu upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman or a packer, or a shipping agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods in transitu. It must be observed that there is, besides the propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz., that the arrival which is to divest the vendor's right of stoppage in transitu must be such that the buyer has taken actual or constructive possession of the goods."

In *Feise v. Wray*, 3 East 93, the vendor had received acceptances from the vendee for the value of the goods, which he had discounted, and which were in fact proved against his estate. The Court held that the right to stop remained; that whatever was received from the bankrupt's estate on the bills would diminish the lien which the vendor had, and part payment did not destroy the lien.

In *Edwards v. Brewer*, 2 M. & W. 375, the consignor had received from the consignee an acceptance for the amount of the goods, which was current at the time of the insolvency. Sir F. Pollock, who argued for the assignee of the bankrupt said, at p. 377: "The plaintiff, having received the

bankrupt's acceptance for the goods, has no right to retake them on his becoming insolvent, without tendering back the bill. His omission to do so does not indeed preclude him from stopping the goods in transitu, but he is not entitled to the absolute possession of them without delivering up the bill, and was not entitled to succeed in that issue."

In giving judgment, Parke, Baron, said: p. 379, "It is settled by the case of *Feise v. Wray*, that by an acceptance of bills the vendor's right to stop in transitu is not taken away. The acceptance would not diminish his right to retain possession until the whole price was paid."

In *Miles v. Gorton*, 2 Cr. & M. 504, 509 S. C. 4 Tyr. 299, Bayley, B., said: p. p. 298, 299, of the latter report, "The circumstance of the bill (for the price of the goods) outstanding in the hands of a third person might suspend the seller's lien during the time it was running, and might prevent the defendants from selling the hops to another person; but will the assignee of the buyer (a bankrupt), whose right accrues in the interval, be entitled to sue for them?"

In giving judgment, Bayley, B., said: 4 Tyr. p. 303, "It has been argued, that as the bill drawn by the defendants on and accepted by the bankrupt is still outstanding, the sellers could not retain these hops. It is true that owing to that circumstance they may not have that complete control over them which it would be necessary to have in order to confer a complete title on another; but still their right to retain possession till the payment stipulated for will not be affected."

In *Cross's Law of Lien*, at p. 328, it is thus laid down "On the sale of chattels it is otherwise; for the running securities till dishonoured or rendered nugatory by the insolvency of the purchaser, operate as a bar to the vendor's right of lien. The latter event would, however, be alone sufficient to revive the power, during the continuance of possession by the vendor, though no formal dishonour of the security had been communicated, for it

would be idle to term that a security which the inability of the party giving it to meet his pecuniary engagements has rendered a mere piece of waste paper. If the purchaser have actually become bankrupt, having previously to his bankruptcy accepted bills drawn on him for the amount of the goods, such acceptances are proveable under his commission, and lessen the lien of the vendor by the amount recovered, but do not defeat his remedy for the residue." *Feise v. Wray*, 3 East 93; *Edwards v. Brewer*, 2 M. & W. 375; *New v. Swain*, 1 Dan. & Ll. Mercantile Cases 193 are referred to as the cases establishing the proposition.

There is a note to *New v. Swain* at pp. 195, 196, 197, on this subject.

If the time of credit has not expired and yet the unpaid vendor may excuse the right of stoppage in transitu, I fail to see why the vendor taking a bill, the time for the payment of which has not expired when the insolvency takes place, should prevent the exercise of the right.

The ordinary lien for the unpaid purchase money of goods cannot be exercised when the goods remain in the vendor's possession, unless the time of his credit has expired.

But it seems, if the goods are sent forward to the purchaser, the right of stoppage in transitu attaches when the vendee becomes insolvent. The insolvency, therefore, of the consignee seem to give the right of establishing a lien when the time for payment has not expired, which does not exist when the property remains with the seller, and the time for payment has not arrived, where the purchaser has not become insolvent. The mere receiving of the purchaser's acceptance to pay at the time of expiration of the credit, does not, from the authorities referred to, seem to be any obstacle to the asserting of the right of stoppage in transitu when insolvency takes place before the goods get into possession of the purchaser.

In *Benjamin on Sales*, 2nd ed. at p. 693, referring to this subject, the learned author states "The vendor's right (of

stoppage in transitu) exists notwithstanding partial payment of the price ; and it is not lost by his having received conditional payment by bills of exchange or other securities, even though he may have negotiated the bills outstanding in other hands, unmatured."

Hodgson v. Loy, 7 T. R. 440 ; *Feise v. Wray*, 3 East 93 ; *Edwards v. Brewer*, 2 M. & G. 375 are referred to.

As already mentioned, on the argument of the last cited case, the learned counsel, afterwards Chief Baron Pollock, admitted the right of stoppage existed, though the bills were not due and outstanding, but he contended that the right of the vendor to retain the goods, which was the issue in that case, was not established, unless the dishonoured bills were produced. Here the bill is produced, and there is really nothing to shew that the assignee of the insolvent, at any time before the interpleader order was issued in October, 1874, ever placed himself in a position to get possession of the goods by offering to pay the duties and freight, so that the transitus, as far as these goods are concerned, may never yet have been terminated by the *delivery* of the goods to any one.

On the whole, we think the verdict for the plaintiffs is right, and ought not to be disturbed.

Rule discharged.

ASCHER V. THE GRAND TRUNK R. W. Co.

Stoppage in transitu—Notice to stop—Goods in bond.

Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs.

Held, that the notice to the company was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery.

APPEAL from the County Court of the County of York.

Declaration. First count: trover.

Second count: That the plaintiffs delivered to the defendants, being carriers, &c., certain goods of the plaintiffs, to be carried from Montreal to Toronto, and delivered there to Hurd & Leigh, or their assignees, subject to the condition that if before the delivery Hurd & Leigh became insolvent, and the plaintiffs thereupon notified the defendants of their desire to stop the delivery of said goods, and should afterwards order the delivery of the goods to another person, such goods should be delivered in accordance with such instructions: that the defendants received the goods for the purpose and on the terms aforesaid: that afterwards, and before delivery of the said goods, Hurd & Leigh became insolvent, and the plaintiffs thereupon, and before the delivery of the goods, notified the defendants to stop delivery of said goods and to deliver them to Ascher & Co., yet the defendants so negligently conducted themselves, &c., though ample time intervened to stop said goods to Hurd & Leigh, that the said defendants did not stop delivery of the said goods, &c., whereby the plaintiffs lost their lien on the said goods, &c.

Pleas to first and second counts, Not guilty. 2. Not possessed; and to the second count a further plea denying the delivery of a notice to stop. Issue.

The trial took place before Duggan, Co. J., on the 15th

of June, 1872. A portion of the evidence was taken by commission, and a portion at the trial.

The important facts may be condensed as follows: The plaintiffs, through their agents in Montreal, Boyd, Egan & Co., delivered to defendants' company, in bond, on the 14th of November, 1871, two casks and a case of earthenware consigned to Hurd & Leigh, Toronto. The numbers given on the shipping bill were 1337, 1338, 1338 B. One of these packages, No. 1338, reached Toronto on the 21st of November, and Hurd & Leigh were advised of its arrival on the 22nd of November. The other two packages were forwarded on the 28th of November, and reached Toronto on the 1st of December.

The plaintiffs, hearing of Hurd & Leigh's insolvency, sent E. C. Sharp, their clerk, on Saturday, the 2nd of December, to defendants' agents in Montreal, directing them not to deliver to Hurd & Leigh, but to Ascher & Co., and gave them written directions, which were not produced at the trial.

The clerk stated it was to the effect, "Please alter consignee of the casks or packages Nos. 1337, 1338, & 1338 B. from Hurd, Leigh & Co. to Ascher & Co.," and that he also gave Mr. Summerskill, defendants' freight agent at Montreal, the bill of lading on which the goods had been delivered to defendants, and left it with him.

The defendants' agent at Montreal, ascertained from Boyd, Egan & Co. that Ascher & Co. were the parties who had really sent forward the goods, and that their directions to change the consignees from Hurd & Leigh to Ascher & Co. were to be followed. On this he caused a telegraph to be sent, but he did not direct them to stop the *three* packages, the numbers of which were given to him, and which were men- he gave way bill that Sharp had delivered to him when tioned in the the order to change the consignment; but only directed them to deliver to Ascher & Co. the two packages contained in a certain shipping bill (the number of which he gave). These packages were stopped and delivered to plaintiffs.

The other package was delivered to John Fisk & Co. on the 6th of February, 1872, on an order signed by the defendants' head of freight department at Toronto, and addressed to defendants' freight agent, directing the delivery of the goods on payment of charges.

James Woodhouse, an officer of the Customs, stated that the goods in question were in bond, and were delivered out on the 8th February. No one could have got them till the duties were paid or the entry made.

A verdict was rendered for the plaintiff for \$40.

The defendants' counsel took several objections to the way in which the case was left to the jury, which were renewed on the motion in the Court below for a nonsuit. The rule for a nonsuit was discharged, and from that the defendants appealed.

Several questions of fact were raised upon the appeal and in the Court below, but it is thought necessary only to report the judgment upon the 8th and 9th objections taken. These were :—

8. The goods being in bond, notice to the defendants was not good, as they were in the custody of the law.

9. As the goods were in the custody of the law, and the evidence shewed that no person was entitled to custody without paying the duties, and no one had tendered the duties, the plaintiffs could not now maintain trover.

February 9, 1874, *T. Ferguson*, for the appellant.

W. H. Lockhart Gordon, contra. The arguments and cases cited were similar to those in *Lewis v. Mason*, ante p. 590.

June 19, 1875. RICHARDS, C. J., delivered the judgment of the Court, (after disposing of the questions of fact).

The 8th and 9th grounds raise a question which must be discussed at some length.

Under the Customs Act of 1867, 31 Vic. ch. 6, D., we understand that goods are entered in bond in Montreal, and they are removed to Toronto. When entered, a bond is taken

from the importer to secure the duties. They are sent forward, and when deposited in the bonded warehouse here, they cannot be taken out for consumption unless the duties are paid. The consignee or owner here may enter into fresh bonds for the payment of the duties, and then the consignor is relieved from the bond given by him. The government authorize the warehouseman to charge rent. The parcel in question came here, and, according to the evidence of a custom-house officer, was taken into bond in the Grand Trunk warehouse. It was entered and taken out of bond on the 6th of February, 1872, by John Fiske & Co.

Across the face of one of the advice notes of this cask, is written :—

“Deliver this to Messrs. John Fiske, & Co.” or order, they paying charges.

5th February, 1872.

P. S. STEVENSON.

Mr. Stevenson was head of the defendants' freight department here. This order was of course long after the company was notified that the name of the consignee had been changed as to this package.

It is urged that as the package was in the bonded warehouse, and therefore in the control of the customs, therefore the notice of the stoppage must be given to the customs' officers, and not to the defendants.

Here, however, the course of business, as we understand it, is that the goods when delivered to the defendants were to a certain extent in the custody of the officers of the revenue. The railway company, or their officials, would be guilty of a breach of duty if they delivered over the package to the consignee until the same was entered and the duties paid; and so it would be if the goods were on board a ship; the transitus would not have ended until there was a permit to deliver to the consignee; and I apprehend the customs' officers would have had no power to deliver these goods to the consignee, until the charges of the railway were paid, and in practice they do not deliver them at any time to any one. The officers of the company

themselves deliver the goods, on the permit of the officer of customs, and the document under which they were finally delivered contained on its face the endorsement—"John Fiskens & Co., this is in bond, please pass entry, *and we will deliver at once*,—Yours truly, J. SIMPSON."

Looking at all the circumstances, we think it is apparent that the officers of the defendants' company had such a possession of the goods, that subject to their being entered and passed through the customs, they could and did deliver them to whomsoever they pleased. They would have no right to deliver them until the duties were paid. But if they assume to dispose of the property subject to such payment of duties, and give a written acknowledgment that they hold the same for a person who claims to be the owner, and in fact deliver it to that person, after having been served with a notice which had the effect of giving rights to the unpaid vendor of that property, we fail to see how they can say they had no control over the property, and were not the parties to whom the notice to stop the delivery to the consignee should be given. As a matter of fact, we apprehend the warehouse is in charge of the officers of the railway, though there is a customs' lock on it, but the customs' officer could no more deliver goods without the consent of the railway, than the railway could without the consent of the customs' department.

The possession by the company of goods sent in a bonded car from Montreal to Toronto, is in effect the same, as far as we can see, as it is after the goods reach this place. If the company are in possession whilst the car is on the way from Montreal to Toronto—and they can, we should say, be notified to stop the goods, in consequence of the insolvency of the consignee, before they reach their destination—then why may they not be so notified after the goods reach Toronto, and after they go from the bonded car into the bonded warehouse? In both cases the lien of the Crown for the duties subsists, and the delivery by the officers of the company without payment of the claim of the Crown would be a breach of duty. But the company

could in fact prevent the delivery to the consignee, even though the duties were paid, though they might not be able to deliver it to him till after the duties had been paid.

We think it is not unreasonable to hold that notice may be given to the railway company when the goods, which have been sent forward by them, are in their own warehouse, and under their own charge, subject to the directions of the government as to being held for duties thereon.

Of course, trover would not lie against the company for not delivering the goods to the consignor or his agent, if they declined to deliver because the duties were not paid ; but if they retained them as the property of another, and declared they held the goods as the property of that other, we see no reason why an action would not lie.

The second count of the declaration substantially sets out the negligence and default of the defendants, and we think under it the plaintiffs may sustain the action.

The case of *Burr v. Wilson*, 13 U. C. R. 478, which was not cited in either of the arguments of this cause, seems to me to lay down doctrines which will sustain the plaintiffs case. There the goods were sold in New York to one Fahey and forwarded to Kingston. They were landed at the custom-house wharf, and placed in the customs' storehouse, No entry was made by the purchaser in respect of them, nor were the duties paid. Subsequently, and before the alleged stoppage in transitu, Fahey entered, paid duty, and removed from the customs' warehouse two cases out of the six which were there. Shortly after, Fahey became insolvent, when the plaintiffs learned the goods were in the warehouse, and notified the wharfinger who had it in charge, and who had possession of the warehouse conjointly with the custom-house authorities, not to deliver the goods to Fahey's assignees, but to the plaintiffs, claiming to stop them in transitu. When the stoppage took place, the goods were in the possession of the wharfinger, subject to the permit of the custom-house officers, and Fahey's order, on production of permit, and payment of duties. The freight of the goods from New York and all charges had been paid

by Fahey. It was argued that the custody of the custom-house officers was not the possession of the wharfinger, and notice to the wharfinger was of no use, for he had no control over the goods ; he was merely the servant of the custom-house officer to hold them. The Court, on the authority of *Northey v. Field*, 2 Esp. 613, held the plaintiffs had the right to stop them. Mr., Justice Draper, now Draper, C. J. of Appeal, referred to 10 & 11 Vic. ch. 31, sec. 12, as to goods being put into customs' warehouses, considering the notice to the warehouse-keeper sufficient.

Howell v. Alport, 12 C. P. 375, affirms the right to stop in transitu when the goods are warehoused. There the consignee actually took the goods from the vessel in which they arrived, with his own teams, and placed them in a bonded warehouse of his own, of which he held one key, and the customs' officer the other. There the demand was made from the officer of customs, and it was held the vendor was in time to stop in transitu, the goods not having been taken out of bond.

If the carrier refuses to deliver goods to the consignee until paid his freight, the right of the vendor to stop in transitu continues as long as the goods remain undelivered.

In *Crawshay v. Eades*, 1 B. & C. 181, Bayley, J., said at p. 184 : " In order to divest the consignor's right to stop in transitu, there ought to be such a delivery to the consignee, as to divest the carrier's lien on the whole cargo."

Best, J., said, at p. 185 : " Until the carrier parts with the possession of the goods, the special property which he has in that character remains in him; and it is clear, that he is entitled to retain possession of the goods until the freight due to him is tendered or paid. He may, however, assent to the consignee having possession of the goods without payment of the freight ; but it is clear, in this case he never did so assent. * * The freight, therefore, not having been tendered or paid, and the carrier not having intended to part with the possession, without payment of the freight, his lien still continued. The property, therefore, had not passed from him to the

consignee, and, consequently, the consignor had a right to stop in transitu."

Here, there is no doubt that the defendants never intended to let the consignee, or the person to whom they transferred their interest, have possession until the lien of the Government for the duties was paid, and therefore neither actually nor constructively could the consignee have obtained possession until long after the demand to transfer to the plaintiffs.

On the whole, then, we think there was evidence to go to the jury of notice to the company in reasonable time to stop the goods, and that the notice to the defendants as a party who had possession of the goods was sufficient, though as a matter of precaution in these cases it will be advisable to give notice to the railway company and to the custom-house officer.

We think the appeal in this case should be dismissed with costs.

Appeal dismissed with costs.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH:

FROM MICHAELMAS TERM, 38 VICTORIA, TO EASTER TERM, 38 VICTORIA.

ACTION.

Right to maintain on order under English Companies Act, 1862.]—
See CORPORATION, 1.

AGENT.

See PRINCIPAL AND AGENT.

ALIMONY.

See DEPARTURE—HUSBAND AND WIFE 2.

AMENDMENT.

Where a declaration was held bad because by several beneficiaries jointly on a policy of life insurance an amendment was allowed, striking out all but one plaintiff and allowing her to declare anew for her share. *Fraser v. Phoenix Mutual Life Insurance Co.*, 422.

See CRIMINAL LAW.

APPEAL.

See CORPORATION, 1—ELECTION LAW.
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ARSON.

See CRIMINAL LAW.

BILLS AND NOTES.

1. *Stamps.*]—Where the holder of a note has reasonable notice of the want of proper stamps, he must repel the presumption of knowledge by reasonable evidence, or show that as soon as he acquired knowledge he affixed double stamps, or that he made due enquiry and was thereby led to believe that the note had been duly stamped, or had not reason therefrom to believe that it had not been duly stamped; in either of which cases he may be justified in not attaching the double stamps until he has knowledge by and at the trial.

The notice to or knowledge of his attorney or agent must be considered his.

Upon the evidence, set out in the case, it was *Held* that the double stamps had not been put on in time. *Waterous et al. v. Montgomery*, 1.

2. *Consideration—Pleading.*]—In an action on a note by a payee

against maker, a plea that there was never any value or consideration for the making the said note or paying the same, is bad on demurrer; it should state the circumstances under which the note was given, and deny that there was any other consideration than alleged. *Osborne et al. v. Pierson*, 457.

See EVIDENCE, 3.—PARTNERSHIP.

BONDED GOODS.

See STOPPAGE IN TRANSITU.

BOND.

See DEPARTURE.

BONUS TO RAILWAYS.

See RAILWAYS AND R. W. Cos., 1, 2.

BREWERS.

Power of Ontario Legislature to impose license on.] *Regina v. Taylor*, 183.

BY-LAW.

Prohibiting sale of liquor.]—See LIQUOR, SALE OF, 2.

As to impounding cattle.]—See PLEADING, 3.

As to granting aid to railways.]—See RAILWAYS AND R. W. Cos., 1, 2.

CALLS.

Action for.]—See CORPORATION, 4.

CANAL.

See WATERS AND WATER COURSES.

CARRIERS.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.]—One H. had chartered a schooner from Goderich, to Chicago, and not being able to fill her, told the plaintiffs' agent that they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington & Quincey R. W. Co., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage about 300 barrels of the deck load, not being part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs only got 610 barrels.

Held, in the Court of Queen's Bench: 1. That the owner of the vessel, and not H., was her owner for the trip, and the contractor with the plaintiffs. 2. That if the master delivered the salt on the dock as H.'s salt when it was in fact the plaintiffs', the defendant would be answerable: that there was some evidence of his having done so; and that a verdict for the plaintiffs, therefore, should not be disturbed.

On appeal this judgment was affirmed.

Per Strong, J.—It is the duty of the captain not merely to deliver the goods on the wharf, but as far as possible to separate the different consignments, so as to render them accessible to their respective owners. *Ontario Salt Co. v. Larkin*, 486.

See RAILWAYS AND R. W. Cos., 3.

CHARTER.

Of vessel.—See CARRIERS.

COMMISSION.

To enquire into financial affairs of corporation.—See MUNICIPAL CORPORATIONS, 1.

“ COMPANIES ACT, 1862 ”— (ENGLISH.)

An action will lie in this country on an order made in England under this Act. *Barned's Banking Co., Limited, v. Reynolds*, 256.

CONDITIONS PRECEDENT.

See CONTRACT, 1.

CONSIDERATION.

Plea of want of, for a promissory note.—See BILLS AND NOTES, 2.—GUARANTEE.

CONSTITUTIONAL LAW.

Powers of Dominion and Provincial Legislatures. Regina v. Taylor, 183.

Power of Provincial Legislature as regards the prohibition of the sale of liquor.—See *Slaven and Orillia*, 159.

CONTRACT.

1. *Agreement to furnish security to defendants' satisfaction—Construction—Condition precedent.*—The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition, that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general Board for the due performance of his duties: that he did not furnish such security; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the Board, and that the Board unreasonably, capriciously, and improperly refused to be satisfied therewith.

Held, replication bad; for the furnishing security satisfactory to the Board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting *bonâ fide* under an honest sense of dissatisfaction. *MacMath v. Confederation Life Association*, 459.

2. *Co-contractors—Payment by one*—26 *Vic. ch.* 45.]—An action having been brought and a judgment recovered against two defendants on a contract by them to carry certain lumber, the verdict and costs were paid by one defendant, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in the plaintiff's name against the other defendant for one-half of the debt and costs.

Held, clearly not warranted by

the 26 Vic. ch. 45, and the execution was set aside. *Potts v. Leask et al.*, 476.

Construction of.]—See GUARANTEE—SALE OF GOODS, 1.

CONTRIBUTORY NEGLIGENCE.

See INNKEEPER—MUNICIPAL CORPORATIONS, 2.

CONVICTION.

Negating exceptions in' Statute.]—See LIQUOR SALE OF, 1.

CORPORATION.

1. "*The (English) Companies Act, 1862*"—*Order thereunder making calls—Right of action on such order here—Defences available thereto—Liability as past or present member—Pleading.*]—An action will lie in this country, on an order made under "The Companies Act, 1862," in England, in the winding up of a company, making a call upon defendant in respect of his shares, and directing payment thereof to one of the two official liquidators appointed; and such action may be brought in the name of the company.

The statute enacts that such order, subject to the provisions in the Act contained for appealing against it, shall be conclusive evidence that the moneys thereby ordered to be paid are due; and that all other pertinent matters stated in such order shall be taken to be truly stated, &c. *Held*, that the provision for appeal did not prevent the order from being final so long as it remained unaltered, and that an allegation that the order was still in force sufficiently negated an appeal.

Held, also, unnecessary to allege in the declaration that the shares were not paid up, or that defendant was a member when the call was made.

A plea alleging that the order was not final, but could be varied, rescinded, or set aside, was held good; and a replication thereto, that by the Act there could be no appeal from the order, except on notice given within three weeks after it had been made, and that no such notice was given, was also held good.

The statute makes the liability a debt, "in England and Ireland of the nature of a specialty:" *Held*, that this did not make it a specialty debt in this country; and that pleas of never indebted, and that the debt did not accrue within six years, were therefore good.

Held, also, that under our Act 23 Vic. ch. 24, the order, notwithstanding the enactment above mentioned, was not conclusive, but that defendant might plead to this action on the order any defence which he might have set up to the original proceedings. Pleas, denying, 1. That defendant was the holder of shares or a member of the company; 2. That the company was unable to pay its debt; 3. That the Court making the order was of opinion that the company should be wound up; and pleas setting up that the defendant was only a past member and that the call was made in respect of debts contracted after he ceased to be a member—that the existing members were able to satisfy the contributions required—and that no amount was unpaid on the shares—were therefore held good.

Held, also, that the general averment that all things happened, &c., necessary to render defendant liable

to pay and entitle the plaintiff to maintain this action, sufficiently alleged, if defendant could be considered as being charged as a past member, that the Court was of opinion the present members were unable to pay, and that the call was a debt accrued before defendant ceased to be a member. But,

Held, also, that the declaration charging him *as a member*, must be construed as charging him as a present member: that a plea showing him to be a past member only was a traverse of his being a member as alleged; and that there would be a variance therefore if such plea were proved. *Barned's Banking Co., Limited, v. Reynolds*, 256.

2. *Creditor of company—Action against shareholders — Set-off.*]—Action against defendant as a shareholder in a company incorporated under the 27—28 Vic., ch. 28, by the plaintiff, a creditor of the company, alleging a judgment recovered and *fi fa.* returned *nulla bona*. Plea on equitable grounds, a set-off due to defendant by the company, on the common counts, and on a judgment recovered by the defendant against the company, on which a *fi fa.* had been returned *nulla bona*.

Held, per Gwynne, J., that the plea formed no defence: for the plaintiff was not claiming in right of the company, but by virtue of a specific statutory remedy; and the decision in *Macbeth v. Smart*, 14 Grant 298, was in principle applicable, notwithstanding the fact of defendant having a judgment and execution.—*Benner v. Currie*, 411.

3. *Corporation—Sci. fa. against shareholders.*]—The 27—28 Vic., ch. 24, sec. 27, incorporating the company in which the defendants were share-

holders, enacts that every shareholder, until his stock has been paid up shall be liable to the creditors of the company to the amount unpaid thereon; "but shall not be liable to an action therefor by any creditor" until an execution against the company has been returned unsatisfied, &c.

Held, that *sci. fa.* would lie by a judgment creditor of the company against a shareholder, though the general practice here is to proceed by action, for a *sci. fa.* is in fact an action. *Gwatkin et al. v. Harrison*, 478.

4. *Action for calls.*]—Declaration by the Port Dover and Lake Huron R. W. Co., against defendant as a shareholder, alleging that the defendant holds four shares, and has paid ten per cent. thereon, and is indebted to the company in \$80, in respect of two several calls of \$10 each on each of said shares. Plea 2, That after the passing of the Act incorporating the company, 35 Vic., ch. 53, O., and before the 37 Vic., ch. 57, O., amending it, defendant subscribed for said shares, but did not, within five days next thereafter, pay ten per cent. thereon, whereby the subscription became void.

The 35 Vic., ch. 53, sec. 7, enacts that no subscription of stock shall be valid, unless ten per cent. shall have been paid thereon within five days after subscription; and by 37 Vic. ch. 57, sec. 1, all subscriptions of stock shall be valid on which ten per cent. shall have been actually and *bonâ fide* paid. *Held*, plea bad, for the payment after the five days was sufficient.

Third plea, that the Act of Incorporation provides that \$25,000 of stock shall be subscribed, and fifty per cent. be paid thereon, and the rail-

way be *bonâ fide* commenced within two years, otherwise the charter should be forfeited and be void ; and that this requirement was not complied with. *Held*, bad, on the authority of *City of Toronto and Lake Huron R. W. Co. v. Crookshank*, 4 U. C. R. 309.

The fourth, fifth and sixth pleas set up that notice of the calls was not duly given and published ; that the call exceeded ten per cent, on the subscribed capital, contrary to the Acts ; and as to the second call, that it was made payable at a less interval than two months from the previous call. *Held*, good, under 35 Vic., ch. 53, secs. 13, 14, and C. S. C. ch. 66 sec. 48.

Seventh. plea, in substance, that defendant subscribed for the shares on the express condition that \$100,000 should be subscribed applicable wholly to the construction of the road from Port Dover to Woodstock before any calls should be made in respect of his shares ; that he never waived this condition, and that said sum had not been so subscribed. The company was incorporated to build a road from Port Dover to Woodstock, with power to extend the same to Stratford. *Held*, plea good, for that it was competent for the company to receive subscriptions of stock to be applied to the main line and the extension separately, provided the condition was expressed in the subscription, and was not a secret qualification.

Eighth plea, that by plaintiffs' charter the capital stock was declared to be \$250,000 ; that the defendant never subscribed except on the terms expressed in the said charter ; that the full amount of said stock should be subscribed for before the road should be commenced ; that not one-third of such stock was sub-

scribed for ; that the ten per cent. actually subscribed for was sufficient for the expenses in procuring the Act, and making the surveys and estimates for the works ; and that defendant subscribed before the general meeting required by sec. 8 of the Act, on the day of which meeting \$100,000 was subscribed, &c. *Held*, no defence.

The ninth plea, on equitable grounds, set out, in substance, that the road and extension would cost \$900,000 ; that the assets which the company had or could acquire would not exceed half that sum ; that there was no possibility of making the road therewith, as the directors and plaintiffs well knew, but that they were proceeding to construct part, and to expend all said assets, in bad faith, for improper purposes, and with the view of personal gain to the directors and others in collusion with them, &c. *Held*, no defence to this action ; that the charges were too loose and indefinite ; and that if sustainable they would form proper ground for a bill in equity only. *Port Dover and Lake Huron R. W. Co. v. Grey*, 425.

5. *Joint Stock Companies under C. S. C. ch. 63—Liability of stockholders—Payment of stock—Registration of certificate—Pleading—Departure.*—The C. S. C. ch. 63, enacts that the stockholders of any company incorporated thereunder shall be "jointly and severally liable" for all debts and contracts made by the company. *Held*, nevertheless, that a creditor might sue one, or any number more than one, of the stockholders.

In an action by creditors of the company against five shareholders, the declaration, after setting out an unsatisfied judgment recovered by plaintiffs against the company, alleged

that the defendants before the debt was contracted, and before this suit, were stockholders, and had not paid up their shares in full, whereby defendants became liable to pay said judgment.

Three of the defendants pleaded that they were not stockholders when the contracts in respect of which the notes were given were made, nor from thence until, nor at, the commencement of this suit. The plaintiffs replied that these three defendants were trustees of the company, and omitted to make the annual report required by the statute, whereupon they became individually liable for the debts of the company. *Held*, that the replication was a departure, in alleging a different ground of liability from that taken in the declaration, and a ground which applied only to three out of the five defendants; and that in this latter respect there was a misjoinder.

The second plea by two of the defendants, alleged that within five years from the incorporation of the company they paid up their full shares, and before this suit, to wit, on the 1st October, 1873, a certificate to that effect was made, &c., and was duly registered, &c., "in the manner required by the statute in that behalf. *Held*, following *pro forma* the decision of the C. P., in *McKenzie v. Kittridge*, 24 C. P. 1, that the plea was good, though not shewing that the certificate was registered before the debts on which the judgment was recovered were contracted. This Court, however, did not agree with that decision, but considered, taking together secs. 33, 34 & 35, that to protect himself from liability a shareholder must register his certificate of payment; and that if registered within thirty days from the payment the exemption would

relate back to the time of payment, but if not, would begin only with the registry.

The fifth replication to the second plea was, that the defendants were original stockholders, that the whole capital stock had never been paid in, and that the debt in the declaration mentioned was contracted by the company before the payment in full of defendant's shares, and before registration of the certificate. *Held*, good; and that under sec. 33, a shareholder complying with the requirements is discharged from liability, though the full capital stock is not paid up.

Sixth replication: that the certificate of payment mentioned was not made and sworn to, nor registered within thirty days after such payment, as in the said plea alleged, in the manner by the said Act directed. *Held*, bad, for the plea did not allege a registration within thirty days, and if before the contracting of the debt it would discharge the defendants, though not within the thirty days.

Another defendant, O., pleaded that he had paid up his shares in full, and had made and registered a certificate as required by the Act, and had done the same in the time and after the manner required by the Act to free him from personal liability for the debts of the company. The third replication to it was the same as the fifth replication to the second plea, and was *Held*, good.

Held, also, that both pleas were improper in form, in pleading matter of law—that the certificate was duly registered, &c.—instead of alleging the facts, when it was registered or when he paid up in full, &c., which the jury could try.

The fourth replication to O.'s plea was similar to the sixth replication to the second plea. The defendant

O. rejoined, on equitable grounds, that before the debt in the declaration mentioned was contracted, and before this suit, he had paid his shares in full, of which the plaintiffs had notice, and that he registered the certificate of payment as soon as he knew that it was required by the Act. *Held*, that the rejoinder was bad, as being a departure from the plea; but that otherwise it shewed a good answer on the merits. *McKenzie et al. v. Dewan et al*, 512.

Liability of past or present member of.—See CORPORATION, 1.

CRIMINAL LAW.

Arson—*Sufficiency of indictment*—*Amendment of count*—“*The merits of the case*”—32-33 Vic., ch. 24, sec. 71.]—Defendant was charged with having set fire to a building, the property of one J. H., “with intent to defraud.” The case opened by the Crown was, that the prisoner intended to defraud several insurance companies, but the legal proof of the policies was wanting, and an amendment was allowed by striking out the words with “intent to defraud.” The evidence shewed that different persons were interested as mortgagees of the building, a large hotel, and J. H. who was the prisoner’s brother-in-law, as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested, and they found a verdict of guilty:—*Held*, that the amendment was authorized and proper, and that the conviction was warranted by the evidence.

The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent

to injure or defraud must be shewn on the trial.

“The merits of the case,” with reference to amendments, under 32-33 Vic., ch. 29, sec. 71, D., means the justice of the case as regards the guilt or innocence of the prisoner; and “his defence on such merits” means a substantial, and not a formal or technical defence. *Regina v. Cronin*, 342.

See DEFAMATION, 1.

CROWN CASES RESERVED.

Power of Judge to reserve after verdict and sentence.—See DEFAMATION, 1.

CUSTOMS DUTIES.

See STOPPAGE IN TRANSITU.

DAMAGES.

See DEFAMATION, 2.

DEBENTURES.

In aid of Railway—*Mandamus to Municipal Corporation to deliver to trustees.*—See RAILWAYS AND R. W. Cos., 1.

DEED.

A wife cannot convey land to her husband under 36 Vic., ch. 18 O. *Ogden v. McArthur*, 246.

DEFAMATION.

1. *Indictment for libel*, 37 Vic., ch. 38, sec. 11, D.—*Causing jurors to stand aside.*—The 37 Vic. ch. 38, sec. 11 D. enacts that the right of the Crown to cause jurors to stand aside shall not be exercised “on the trial of any indictment or information by a private prosecutor

for the publication of a defamatory libel." *Held*, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels; and that the fact of the prosecution being conducted by a counsel appointed by and representing the Attorney-General would make no difference.

The Judge, at the trial, allowed the Crown counsel in such a case to direct jurors to stand aside, but, after the verdict and sentence, entertaining doubts, he reserved a case for the opinion of this Court as to the propriety of his having permitted it.

Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute, Consol. Stat. U. C., ch. 112. *Regina v. Patteson*, 129.

2. *Slander—Excessive damages—Evidence.*]—The plaintiff sued his step-mother for slander, in having said of him that when his father was ill, he and his sister went into his bedroom and gave him a drug, after which he went into a doze, and never recovered, and that the plaintiff and his sister had killed him. There was another count charging the plaintiff with having robbed her.

It appeared that the plaintiff and defendant were not on friendly terms, arising out of the defendant's marriage with the plaintiff's father: that the defendant was a garrulous old lady, prone to talk of the family difficulties; and that the words alleged were spoken when the plaintiff's brother-in-law and another person went to see her to get her to sign a release of dower. The defendant denied having charged

any criminal offence, and it appeared that the plaintiff, who was a medical student, had administered some medicine to his father shortly before his death. There was no proof of any actual damage; but the jury gave \$500.

Held, that the verdict was excessive; and the learned Judge who tried the cause being dissatisfied with it on this ground, a new trial was ordered unless the plaintiff would reduce it to \$100.

Held, also, that it was admissible to ask the plaintiff's witness whether the plaintiff was not a student of medicine, although the declaration did not charge that the words were spoken of him in that character. *Cook v. Cook*, 553.

DELIVERY.

Of goods—Mistake in.]—See *CARRIERS*.

DEPARTURE.

Alimony.]—The plaintiff declared as assignee of a bond given to a trustee by a husband and his surety to secure payment of alimony to his wife. Defendant pleaded, on equitable grounds, the decree in Chancery for alimony: that the bond was given in pursuance thereof to the obligee, who had no beneficial interest therein, and the assignment was in fraud of the decree, against the will of the husband, and could not be maintained in equity. The plaintiff replied that the wife by deed assigned her beneficial interest to him. *Semble*, that the replication was not a departure. *Reiffenstein v. Hooper, et al.* 295.

In pleading.]—See *CORPORATION*, 5.

DISTRESS.

See MORTGAGE.

DOMINION LEGISLATURE.

Powers of.]—*Regina v. Taylor*, 183.

DRAINS.

Injury by overflow of.]—See MUNICIPAL CORPORATIONS, 2.

EJECTMENT.

1. *Judgment — Estoppel — Privilege.*]—In ejectment, against two defendants, where the plaintiff claimed under a conveyance from H. the defendants put in an exemplification of a judgment recovered by one defendant, in an action against two sons of H. for trespass to the same land, in which defendants pleaded that it was the freehold of H., under whom they entered; but there was no evidence to connect H. with the trespass or the suit. *Held*, that the plaintiff was not estopped by such judgment. *Cassidy v. Ingoldsby, et al.*, 339.

2. *House encroaching on plaintiff's land—License to occupy—Tenancy at will.*]—The plaintiff owned lot 11 on Seaton street, in the city of Toronto, and defendant lot 10 adjoining. There was a house situated partly on each lot, and it appeared that the plaintiff and one A., under whom defendant claimed, had mutually agreed that A. should occupy a part of the house which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to defendant.

Held, that the defendant must be

regarded either as tenant at will or as occupying under a license from the plaintiff, and could not be ejected without notice or a revocation of the license; and that in either case he would be entitled to a reasonable time to remove what he might have in the house. *Keys v. Guy*, 356.

See EVIDENCE, 1.

ELECTION LAW.

Voters' lists—37 Vic., ch. 4, O.]—Under 37 Vic., ch. 4, sec. 5, O., the County Judge has the right to examine and decide whether the person objecting to any votes in the list of voters is a voter or person entitled to be a voter, although such complainant may appear on the roll as duly qualified.

The Judge having found as facts, on the evidence before him, that one of the two complainants did not give the notice of his complaint required by sec. 6, and that the other was not entitled to be a voter: *Held*, that his decision could not be reviewed. *Re Parsons and Toms—In re voters' list of Goderich*, 88.

How far the electors' roll is conclusive.]—See MUNICIPAL CORPORATIONS, 1.

ESTOPPEL.

See EJECTMENT, 1—FIXTURES.

EVIDENCE.

1. *Stamps.*]—*Held*, upon the evidence set out in the report, that double stamps had not been affixed to the note sued on in this case in time. *Waterous et al. v. Montgomery*, 1.

2. *Ejectment—Proof of heirship and identity of parties.*]—In eject-

ment the plaintiff claimed title through the heirs-at-law of P. A witness testified that in 1871 he called at the house of P., who was a retired merchant, in London, England, but did not see him, as he was unwell: that afterwards, in 1872, he was told by members of the family there, representing themselves to be P.'s only brothers and sisters, that P. had died on the 20th May, 1872, intestate, and without children; and that he received from one of them the deeds for the lot, which were produced, four in number including the patent. A deed to the plaintiff's grantor was put in, executed by all these parties in presence of this witness, who stated that he was satisfied they were P.'s heirs-at-law, and that he had searched Doctor's Commons for P.'s will, but found none. It was objected that there was no sufficient evidence of heirship, but the learned Judge who tried the case without a jury, found a verdict for the plaintiff; and the defendant showing no pretence of title the Court refused to interfere on this ground.

There was no proof of identity of the different grantors and grantees in the deeds shewing the chain of title except the similarity of names, and the possession of the patent and deeds. *Held*, clearly sufficient. *Gallivan v. O'Donnell*, 250.

3. *Promissory note—Handwriting—Evidence of experts.*]—In an action on a promissory note against the maker, the defendant swore that the signature was not his, but an expert, comparing it with admitted signatures, said it was written by the same person. The jury having found for the plaintiff: *Held*, on appeal from the County Court, no

ground for a new trial that the jury had not been directed that the evidence of experts was entitled to little weight when contradicted by direct testimony; and the learned Judge below having been satisfied with the verdict, this Court would not interfere. *Luce v. Coyne*, 305.

4. *Defamation.*]—In an action for slander for saying that the plaintiff and his sister went into their father's bed-room while he was ill, and gave him a drug, after which he went into a doze, and never recovered, and that they had killed their father. It appeared that the plaintiff was a medical student and had administered some medicine to his father before his death. *Held*, admissible to ask if plaintiff was not a medical student though the declaration did not charge that the words were spoken of him in that character. *Cook v. Cook*, 553.

See EJECTMENT, 1—SALE OF LANDS FOR TAXES—SALE OF GOODS, 2.

EXCESSIVE DAMAGES.

See DEFAMATION, 2.

EXECUTION.

Issue of by one co-contractor against another for a moiety of a joint debt paid by former. *Potts v. Leask*, 476.

EXPERTS.

See EVIDENCE, 3.

FACTORS' ACT.

Pledge under.]—*See* INSOLVENCY, 3.

FIXTURES.

Trade fixtures—Right to remove—Estoppel—Pleading.]—The weight

of authority is, that a tenant may remove trade fixtures which he might have removed during the term, if he remains in lawful possession after the end of the term, holding possession of the premises under a right still to consider himself a tenant.

Declaration: that defendants being in possession of certain premises, (described), as tenants of the plaintiff, wrongfully pulled down and carried away certain fixtures.

Plea: that the premises were occupied by defendants as scale makers, having long before been let to defendants and others for carrying on their trade; that defendants and others, for such purpose, during their tenancies, put up the fixtures (describing the fixtures put up by each), and the others, during their tenancies, sold and conveyed their part of the fixtures to defendants, who took possession thereof and used them on said premises in their trade; and being so possessed, they, during their tenancy, pulled down and carried away said fixtures, doing no unnecessary damage.

First replication, as to the fixtures put up by the others: that they were not severed or removed during the tenancies of the parties who affixed them, *nor for a long time afterwards*.

Held, that the replication was bad, for if the defendants owned the fixtures and removed them whilst in possession of the premises with a right to consider themselves tenants, the delay to remove them "for a long time" would make no difference. *Held*, also, that the plea was good.

There was an equitable rejoinder which is set out in the report, the validity of which was not decided.

Second replication: that the fixtures were so affixed to the buildings in the demised premises that they could not be removed without injury to the freehold. Rejoinder: that they were such trade fixtures as in the plea alleged, and were removed without causing more injury to the freehold than was permissible by the laws of Ontario concerning fixtures. *Held*, that the replication and rejoinder were both good: that it might be a mixed question of law and fact, whether the alleged fixtures were so attached that they could not by law be removed; and that the rejoinder might be considered as an informal joinder of issue.

The third replication set up by way of estoppel, a surrender in law by defendants of the premises to one C., the then owner in fee, and an acceptance of a new lease from C., and that C. afterwards conveyed in fee to the plaintiff, who then saw the new lease, and was informed and believed that the said fixtures formed part of the freehold; and that defendants afterwards became plaintiff's tenants. Equitable rejoinder: that before the conveyance by C. to the plaintiff, the plaintiff knew that defendants were in actual occupation, claiming and using all said fixtures as their own, and was told by C. that he did not own or claim them, and only sold to the plaintiff the premises without them; and that the plaintiff by reasonable care could have obtained full information from defendants, but negligently omitted to do so. *Held*, that the replication was good, and the rejoinder bad. *Pronguey v. Gurney et. al.* 53.

FOREIGN CORPORATION.

Right of agent of to maintain replevin in his own name.—See REPLEVIN.

FOREIGN JUDGMENT.

See CORPORATION, 1.

GUARANTEE.

Construction — Consideration.—There were three executions in the Sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows: "I agree with G. W. & C. (the plaintiffs) to pay off the principal, interest, and costs, with Sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the Sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with defendant to go out to the place and postpone it, for which the defendant was to pay the expense. When the bailiff got there the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of \$45, which was paid to defendant. The plaintiffs thereupon sued the defendant on his guarantee: *Held*, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the

plaintiffs were the proper parties to sue. *Guthrie et al. v. O'Connor*, 372.

HANDWRITING.

Proof of.—See EVIDENCE, 3.

HEIRSHIP.

Proof of.—See EVIDENCE, 2.

HUSBAND AND WIFE.

1. *Married Woman's Act, 1873—Conveyance by husband to wife.*—A married woman is not enabled by "The Married Woman's Real Estate Act, 1873," 36 Vic. ch. 18, O., to convey land to her husband. The requirement that the husband shall be a party to and execute such deed means that he must be a grantor.

Quære, as to the effect upon secs. 2, 3, and 4 of C. S. U. C. ch. 85, of the repeal, by 36 Vic. ch. 15, of 34 Vic. ch. 24, which repealed them. *Ogden v. McArthur*, 246.

2. *Bond to secure alimony—Right to assign—Pleading—Departure.*—A bond given to a trustee, by a husband and his surety, to secure payment of alimony to the wife, in pursuance of a decree of the Court of Chancery, was held not to be assignable by the trustee and wife, such assignment being contrary to public policy, and tending to lessen the inducement to reconciliation. *Reiffenstein v. Hooper et al.*, 295.

IDENTITY.

See EVIDENCE, 2.

INDICTMENT.

For arson—Sufficiency of.—See CRIMINAL LAW.

For Libel.—See DEFAMATION, 1.

INFORMATION.

Right of the Crown to proceed by against a brewer because not licensed—Remarks as to form of.] Regina v. Taylor, 183.

INN-KEEPER.

*Loss of goods—Liability.]—*The plaintiff arrived in Toronto from Ireland, and drove from the railway station to defendant's hotel, having a portmanteau, carpet bag, &c., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, and after occupying it for about an hour went to his friend, with whom he remained. He was furnished with a key for the door, but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. The plaintiff said he intended to return that night, but he said nothing of his intention to defendant.

Held, that the plaintiff was not there as a guest after he had dressed and left the inn; and that defendant therefore was not liable as an innkeeper, the portmanteau having been lost after the plaintiff left.

Quære, if defendant had been so liable, whether the plaintiff was not guilty of contributory negligence. *Lynar v. Mossop, 230.*

INSOLVENCY.

1. *Mortgage—Insolvent Act of 1869, sec. 50—Right to distrain for mortgage money.]—*One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of

1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, the defendants distrained therefor on these goods, which were still upon the mortgaged premises. *Held*, that the defendants' only remedy was by application under section 50 of the Insolvent Act, and that they had no right to distrain. *Munro v. The Commercial Building and Investment Society, 464.*

2. *Claim for rent.]—*A landlord in case of his tenant's insolvency, has no privilege or preference for rent over any other claim: his only protection lies in his right to a preferential lien on property on the demised premises.

On the facts set out in this case, it was held that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal. *In re Kennedy, an Insolvent, Mason v. Higgins, 471.*

3. *Insolvent Act of 1869—Warehouse receipts—Rights of pledgees as against the assignee—Factor's Act, Consol. Stat. C., ch. 59.]—*One C., being the lessee of a coal yard and premises, assigned the property to S. & H., who agreed to receive as warehousemen therein, such wood and coal as C. might deposit, and grant him warehouse receipts therefor, in consideration of which he agreed to pay them $2\frac{1}{2}$ per cent. on the value of such goods, and to give them a first lien therefor. C. continued to

hold possession of the premises as before the assignment, no visible change being made; his sign remained up, he brought in and took out coal as he pleased, and he was to pay the rent and taxes; but S. & H. entered from time to time to see that there was coal enough to meet their receipts, and on some occasions they prevented him from removing more coal, fearing that there would not be enough for this purpose. It was expressly agreed between them that all coal taken out for which receipts had been given, should be replaced with other coal. C. having become insolvent, a question arose as between his assignee and the receipt holders, and R. & Co., mentioned below, as to the right to the coal in the yard.

Held, that S. & H., being legal owners of the premises, could grant warehouse receipts.

The receipts stated that S. & H. had "received in store from vessels deliverable only on surrender of this receipt duly endorsed and payment of charges, to order of C.," so many tons of coal: *Held*, sufficient in form: that they imported *prima facie* that the coal was the property of C.: that the omission to state for or from whom it was received was immaterial; and that, as to the description of the goods, it was unnecessary to state the quality, for the holder might elect, or to identify the specific property covered by the receipt.

One of the receipts was given to one Cockburn, as security for an acceptance which he gave at the time for C.'s accommodation; another to S. & H. as security against their endorsement for C.; and another to S. & H. was given after C.'s cheques had been refused payment, on their application to him for security:

Held, that these receipts were given for debts within the Act respecting warehouse receipts, &c., 31 Vic. ch. 11, D.

Held, also, that under sec. 10 of the Insolvent Act of 1869, the assignee could take only what was the property of the insolvent, and that S. & H., whether the receipts were strictly regular or not, had a lien upon the coal in the premises to the extent of the receipts outstanding and for their commission.

Some of the coal had been sent to C., the insolvent, by R., to sell for him on commission, after the receipts had been given, and were outstanding: *Held*, that C. could not, under the Factors' Act, Consol. Stat C., ch. 59, pledge this coal for payment of the receipt holders; and that R. was entitled before them to so much of his coal as remained unsold. *In re Coleman*, 559.

INSURANCE.

Policy of Life Insurance—Right of action—Declaration—Pleading—Amendment.—The plaintiff H., and the other plaintiffs, infants, by H. as their guardian and next friend, declared on a policy of insurance, alleging that by it, in consideration of the premium paid to them by the plaintiffs, defendants assured the life of F. and by said policy promised to pay the sum insured to the plaintiffs, who at the time of making the policy were respectively the wife and children of F.; and that while the policy remained in force, the plaintiffs then being respectively the wife and children of F., the said F. died, &c.

Held, on demurrer, that the declaration sufficiently averred that the insurance was effected by F., under the 29 Vic. ch. 17, for the benefit of his wife and children.

But, *Held*, also, following *Campbell v. National Assurance Company of the U. S.*, 34 U. C. R. 35, that the plaintiffs could not sue jointly, but must bring separate actions for their respective shares.

The plaintiff H. was, however, allowed to amend by declaring anew for her own share separately, and the names of the other plaintiffs were struck out. *Fraser et al. v. Phoenix Mutual Life Insurance Company*, 422.

JUDGE.

Power to review his decision in settling voters' lists.—*In re Parsons & Toms—Re voters' list of Goderich*, 88.

JURY.

Causing juror to stand aside.—*See* DEFAMATION, 1.

LAND.

License to occupy.—*See* EJECTMENT, 2.—SALE OF LAND FOR TAXES.

LANDLORD AND TENANT.

1. *Verbal lease for five years—entry under—Tenancy from year to year.*—Where the tenant enters under a verbal lease void under the Statute, a tenancy from year to year may be implied though no rent has been paid.

In this case: one R. G. verbally leased a farm to the plaintiff on the 15th of April, 1873, for five years, at \$100 a year. The plaintiff entered on the 17th, cleared 4½ acres, and put in peas and oats, of which the lessor was aware. R. G. died on the 5th September, having devised the land to defendant, who entered in the same month and took

the crops which the plaintiff had sown.

Held, that the plaintiff was a tenant from year to year, and that defendant was a trespasser in entering upon him. *Gibboney v. Gibboney*, 236,

2. *Monthly lease—Notice to quit.*—Plaintiff leased part of a house from defendant L. at \$4 a month, and if L. sold the house he was to leave if he could get another, or, according to some of the witnesses, to leave in a month. L. sold the house and conveyed it, on the 7th August, to the vendee, W., who wanted immediate possession. L. had previously given the plaintiff verbal notice to go, and on the 7th August, after he had conveyed, he at the suggestion of W. gave the plaintiff a written notice, which W. saw L. sign. The plaintiff at first promised to go, but afterwards refused, and his property was put out by L. and the other defendant on the 9th September, on which W. took possession. The jury found that the tenancy was to terminate on a month's notice, and gave the plaintiff a verdict for \$100.

Held, that the finding must be taken to mean that the plaintiff was to have a month after the sale: that if the notice was given, and the entry made, by L. by authority of W. it would be sufficient; and a new trial was granted to determine this point. *Matthews v. Lloyd, et al*, 381.

3. *Insolvency—Claim for rent.*—A landlord in case of his tenant's insolvency, has no privilege or preference for rent over any other claim; his only protection lies in his right to a preferential lien on property on the demised premises.

On the facts set out in this case,

it was held that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal. *In re Kennedy, Mason v. Higgins*, 471.

See EJECTMENT, 2. FIXTURES.

LEASE.

See LANDLORD AND TENANT, 1-2.

LIBEL.

See DEFAMATION.

LICENSE.

See EJECTMENT, 2.

LIEN.

See INSOLVENCY, 2.

LIFE INSURANCE.

See INSURANCE.

LIMITATIONS, STATUTE OF.

See CORPORATION, 1.

LIQUOR.

See LIQUOR, SALE OF.

LIQUOR, SALE OF.

1. 37 Vic., ch. 32, sec. 25 O. — *Conviction under — Negating exceptions.*] — A conviction under sec. 25 of the 37 Vic., ch. 32, O., for unlawfully having spirituous, &c., liquors for the purpose of selling without being first duly licensed thereto, need not negative the ex-

ceptions contained in secs. 26 and 27.

The penalty enacted by sec. 52 applies to cases where the Act complained of was done either by the applicant or by some other person. *Regina v. Breen*, 84.

2. *Prohibitory by-laws—Powers of Municipal Corporations—Authority of the Provincial Legislature — 32 Vic., ch. 32, O.*] — By-laws passed by Municipal Corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine: *Held*, valid, as being within the power of the Corporation, under 32 Vic. ch. 32, O.; and that it was within the authority of the Provincial Legislature to confer such power, under the exclusive legislative authority given to them with regard to “Municipal Institutions,” and to “matters of a merely local or private nature” in the Province; and was not an interference with “the Regulation of Trade and Commerce,” assigned exclusively to the Dominion Legislature.

A by-law passed on the 21st July, 1874, appointed an officer, under 36 Vic., ch. 34, sec. 8, O., to enforce the provisions of said Act, and the Acts therein recited, and the by-laws of the Corporation respecting shop and tavern licenses. This by-law was passed to fill a vacancy in the office, caused by the resignation of the person appointed under a by-law passed in February previous. The 36 Vic. ch. 34, had been repealed when the by-law was passed by the 37 Vic., ch. 32, which gave power to fill a vacancy in such office. *Held*, that the by-law was not invalid, because not passed in February, under sec. 9 of the last

mentioned Act, nor for not defining the duties, &c., of the officer appointed, which might be done by another by-law.

Held, also upon the facts stated in the case, that it was not invalid as not having been passed at a legal meeting of the Council, or signed by the Reeve. *In re Slavin and the Village of Orillia*, 159.

3. 37 Vic., ch. 32, O.—*British America Act, 1867, secs. 91, 92—Powers of Dominion and Provincial Legislatures.*—*Held*, in the Court of Q. B. : (1.) That the Dominion Legislature alone has power to tax and regulate the trade of a brewer, which is a branch of trade and commerce, and having done so, the Ontario Legislature has not the power to restrain it, unless in a qualified manner, and for the mere purposes of police.

(2.) That the prohibition to keep, have, or sell beer, by a brewer, by wholesale, unless under a license and the payment of a tax therefor, is an excess of power by the Provincial authority, and is a restraint and regulation of trade and commerce and not the exercise of a police power.

(3.) That the restriction imposed by the Ontario Legislature on brewers not to sell by retail, as defined by the Act of 1874, 37 Vic., ch. 32, is not *ultra vires*, because it is a mere repetition and renewal of the legislation which was in force here before and at the time of the confederation.

(4.) That the right conferred on the Ontario Legislature to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses, for the purposes of revenue, does not extend to the licenses on brewers and distillers, over which the gen-

eral government only and at all times, exercised jurisdiction, and which are of a higher and different class than the licenses of retail dealers which are mentioned ; and the words "other licenses" have reference to licenses of the kind before stated, such as on billiard tables, livery stables, &c., which are chiefly enumerated in municipal acts.

(5.) That the Ontario Legislature has a right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of confederation the exercise of these powers, and because such power, read in connection with sec. 92, sub-sec. 16 of the Confederation Act is now a matter of "a merely local or private nature in the Province." That power is in restraint of trade as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion Government, must be considered to be modified by the powers which the Ontario Legislature, acting in relation to municipal institutions, may properly exercise.

Per Wilson, J. The Crown is not obliged, under sec. 44, to prosecute before two magistrates, as a private individual would be, but may proceed in this Court by information.

Remarks as to the form of the information in this case.

It was *Held*, in Error, reversing the above judgment of the Queen's Bench, that the Statute 37 Vic., ch. 32, was within the powers of the Provincial Legislature.

Semble, per Draper, C. J., the "exclusive Legislative authority" of the Parliament of Canada, mentioned in sec. 91 of the B. N. A. Act, does not mean exclusive of the Provincial

Legislatures ; but it was intended rather as a more definite or extended renunciation on the part of the Imperial Parliament of its power over the internal affairs of the Dominion.

Per Strong, J., a license which would amount to prohibition would be an undue interference with the exclusive powers of the Dominion Parliament as to trade and commerce. *Regina v. Taylor*, 183.

MANDAMUS.

To compel delivery of debentures.]—*See RAILWAYS AND R. W. Co's.*, 1.

To compel Municipal Council to submit by-law to aid railways.]—*See RAILWAYS AND R. W. Co's* 2.

MASTER AND SERVANT.

See CONTRACT, 1.

MILL.

See WATERS AND WATER COURSES.

MORTGAGE.

Insolvent Act of 1869, sec. 50—*Right to distrain for mortgage money.*]—One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of 1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, the defendants distrained therefor on these goods, which were still upon the mortgaged premises.

Held, that the defendants' only remedy was by application under sec. 50 of the Insolvent Act, and that they had no right to distrain. *Munro v. The Commercial Building and Investment Society*, 464.

MUNICIPAL CORPORATIONS.

1. *Municipal corporations—Commission to enquire into financial affairs—Action by commissioners for expenses.*]—Sec. 243, of the Municipal Institutions Act of 1866, as amended by 34 Vic., ch. 30, sec. 15, O., authorizes the Governor in Council to issue a commission to enquire into the financial affairs of the corporation, in case thirty duly qualified electors of the municipality petition therefore; and sec. 244 enacts that the expense of the commission shall be determined and certified by the Minister of Finance, and shall then become a debt due to the commissioner by the corporation. In an action by the commissioner for such expenses:

Held, 1. That evidence was properly admitted to shew that the petitioners, who were described only as ratepayers, were electors as well ; and, 2. That defendants could not in this action dispute the validity of the commission, by shewing that one of the thirty, though on the electors' roll, was not in fact a duly qualified elector.

Quere, whether, if there had been no petition, the plaintiff could have recovered.

Quere, also, as to how far the roll is conclusive, beyond the right to vote, except for the purpose of an election. *Bristow v. the Corporation of the Town of Cornwall*, 225.

2. *Town corporation—Drains—Injury by overflow—Gratings in side-*

walk.—The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into the plaintiffs' cellar, and damaged their goods there.

The jury found, upon the evidence set out in the case, and which was held by the Court to warrant their finding, that the defendants had reason to believe the drains might be choked, and remained negligently ignorant of their condition; and a verdict for the plaintiffs was therefore sustained.

There were gratings and trap-doors in the sidewalk opening into the cellars of one P., whose premises adjoin the plaintiffs, and which the jury found had been placed there many years before without defendants' permission. *Semble*, that if the water had got into the plaintiffs' premises through the plaintiff's own gratings, defendants would not have been liable; but that as between them and the plaintiffs they were responsible, as they would be if any one had been injured by such gratings, though the person who placed them there might be liable also. *Scroggie et al. v. The Corporation of the Town of Guelph*, 534.

Power to regulate sale of liquor.]
—See LIQUOR, SALE OF, 2,

NATURAL STREAM.

See WATERS AND WATER-COURSES.

NEGLIGENCE.

On the part of town corporation in allowing drains to become choked.]

See MUNICIPAL CORPORATIONS, 2.

Evidence of.—See INNKEEPER—RAILWAYS AND R. W. Co's., 4.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2.

NOTICE.

To stop goods in transitu.—See STOPPAGE IN TRANSITU, 2.

ONTARIO LEGISLATURE.

Power of as to licensing brewers and sellers of liquor.—*Regina v. Tay'or*, 183; *Re Slavin and the Village of Orillia*, 159.

PAROL LEASE.

For five years.—When tenancy from year to year may be implied under. *Gibboney v. Gibboney*, 236.

PARTNERSHIP.

Note signed by one partner in fraud of the firm—Right of bona fide holder to recover.—Defendants and one M. were in partnership in the lumber business at Barrie, the two defendants residing there and M. in Hamilton. The working capital was \$5,100 furnished equally by the three, and was in M.'s hands; and the lumber was, by arrangement of the partners, to be consigned by the defendants to M., who was to accept their drafts for the value, and the necessary funds were to be raised by discounting them. The partnership was formed in December, 1873, and lasted until March, 1874, when M. absconded. In January, 1874, M. took to the plaintiffs a note for \$808 filled up in his writing, and purporting to be made by Wilson, Moul & Co., payable to himself, and endorsed by him, which the plaintiffs

took from him for value. This note was made for his own private purposes in fraud of the partnership, and the evidence was contradictory as to whether the name of the firm was in his writing or not. The plaintiffs' manager swore that he relied on M.'s security and did not inquire about the firm. It was intended or agreed that the name of the firm should be Wilson, Moul & Co.; but that of J. Wilson & Co. was used until March without M.'s knowledge, when the former name was adopted.

The learned Judge who tried the case, without a jury, held that the defendants were not bound.

The Court of Queen's Bench held, as an inference of fact from the evidence (which is more fully stated in the case) that M. did sign the name of the firm as makers and in the proper partnership name; and they entered a verdict for the plaintiffs.

On appeal the Court was equally divided, Draper, C. J. of Appeal, and Strong, J., being of opinion that the appeal should be dismissed, and Burton and Patterson, JJ., contra. The judgment below was therefore affirmed.

Per Draper, C. J. of Appeal, and Strong, J.—The note was made by M. in the proper partnership name; and, assuming that he practised a fraud on his co-partners, the plaintiffs, being *bona fide* holders for value without notice, were still entitled to recover against the firm.

Per Burton and Patterson, JJ.—M., as between himself and his co-partners was not authorized to sign the note in their name, and the plaintiffs having avowedly accepted it on the security of M., not of the firm, about whom they knew nothing and made no inquiries, the de-

fendants were not estopped from setting up M.'s want of authority to bind them. *The Canadian Bank of Commerce v. Wilson & Moul*, 9.

PAYMENT.

By one of two joint contractors on a judgment—Right to issue execution against the other.—See CONTRACT, 2.

PEDIGREE.

Evidence of.—See EVIDENCE, 2.

PERSONAL LUGGAGE.

See RAILWAYS AND R. W. Co's., 3.

PLANTS.

Not personal luggage.—See RAILWAYS AND R. W. Co's., 3.

PLEADING.

1. *General averment that all things happened, &c., sufficiency of.*—*Barned's Banking Co. v. Reynolds*, 256.

See BILLS AND NOTES, 2—DEPARTURE—FIXTURES.

PRINCIPAL AND AGENT.

Where a note is insufficiently stamped, the notice or knowledge of his attorney or agent is notice to the holder. *Waterous et al. v. Montgomery*, 1.

PRINCIPAL AND SURETY.

See CONTRACT, 2.

RAILWAYS AND R. W. CO'S.

1. *By-laws granting aid to railways—Mandamus to issue debentures.*—Upon an application for a mandamus to a township corporation to make and deliver to trustees certain debentures for \$25,000 authorized

by two by-laws of the corporation granting aid to a railway company, it was argued that the company had lost all claim to \$18,000, if not to the whole of the bonus, by non-commencement of their road. On the other hand, the company contended that by certain agreements with the corporation, and by several statutes extending the time for commencement, their right to the debentures was preserved.—*Held*, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was discharged with costs. *Re London, Huron & Bruce R. W. Co., and The Township of East Wawanosh, et al.*, 93.

2. *North Simcoe R. W. Co.*—37 Vic. ch. 54, O.—*By-law to grant bonus—Duty of Council to submit it to rate-payers.*—The North Simcoe Railway Company is incorporated by the 37 Vic. ch. 54, O., sec. 23 of which enacts that any municipal corporation “which may be interested in securing the construction of the said railway, or through any part of which, or near which, the railway or works of the said company shall pass or be situate,” may aid the company by giving money by way of bonus: provided that no such aid shall be given except after the passing of a by-law for the purpose and the adoption thereof by the ratepayers. By sec. 24 the proper petition, as prescribed in that section, shall first be presented to the council, expressing the desire to aid the railway, and stating in what way and for what amount, “and the council shall within six weeks after the receipt of such petition by the clerk of the municipality, introduce a by-law to the effect petitioned

for, and submit the same for the approval of the qualified voters.”

The company were empowered to construct a railway from Barrie or some other point on the line of the Northern Railway, passing through certain named townships, to Penetanguishene, and to extend it from some point in the township of Vespra to connect with the Northern, or with the Toronto, Grey, and Bruce Railway.

A by-law to aid the company by a bonus of \$100,000, reciting that the city of Toronto was interested in securing a railway connection with the townships through which the line would pass, was introduced, on a proper petition, and read twice in the council; but on motion to go into committee on the by-law it was resolved, on a vote of fourteen to seven, that it would be unwise, in view of the large increase of the city debt, to incur further liability to aid a railway totally disconnected with the city and more than sixty miles from it; and that the council, in the interest of the citizens, felt it to be their duty to refuse to submit it to the ratepayers.

Held, affirming the judgment of Gwynne, J., that the council should not be compelled to submit the by-law; and a rule *nisi* for a mandamus was discharged with costs.

Semble, that it was for the council to decide whether the corporation were “interested in securing the construction of the railway;” but that if it was a question for the Court, the materials before them would not warrant a decision in the affirmative.

Quere, per Gwynne, J., whether the provisional directors of the company had any status to warrant their application for such writ.

Semble, that at all events the by-

law submitted should contain proper conditions as to the expenditure of the money, &c., as contemplated by the statute. *Re The North Simcoe Railway Company and the City of Toronto*, 101.

3. *Merchandise carried as personal luggage—Liability.*]—The plaintiff, an emigrant for Toronto, brought with him from England a box, as personal luggage, which contained only rare plants and roses intended for sale. He delivered it to the defendants' baggage master at Quebec, saying that he would pay for it, but not stating its contents, on which the latter asked for his ticket, and on seeing that it was a third class Government emigrant ticket, he said there was nothing to pay, and that it might go with the plaintiff in the train. The plaintiff said the box was marked somewhere "Plants—perishable," but he could not say defendants officers saw it, and it was sworn that if they had been notified that it was freight or merchandise it would not have been taken. *Held*, that defendants were not liable for its loss. *Lee v. Grand Trunk R. W. Co.*, 350.

4. *Accident to passenger — Evidence of negligence.*]—The deceased was a passenger in defendants' railway for W. station, and was, as the conductor said "pretty drunk" when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond it, about four feet from the rail, with his legs cut through at the knee-joints and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there were only

two passengers, to enable persons to alight; but the other passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The conductor and baggage-master also got off there to see the station-master and returned to the cars. There was no further proof of the manner in which deceased met with the accident.

Held, that there was no evidence of negligence on the defendants' part to go to the jury, and a nonsuit was ordered; Richards, C. J., doubting, (but not dissenting), on the ground that deceased having been taken on the train while intoxicated with the conductor's knowledge, and the very short stoppage at the station, afforded some evidence of negligence. *Giles v. Great Western R. W. Co.*, 360.

See CORPORATION, 1.—STOPPAGE IN TRANSITU, 2.

REGISTRATION,

Of stock in Public Companies.]—*See CORPORATION, 5.*

REGULÆ GENERALES.

As to new trial list, 83—As to controverted elections, 441.

RENT.

How far a privileged claim in insolvency.]—*Re Kennedy, Mason v. Higgins*, 471.

REPLEVIN.

1. *Agent of foreign corporation—Lease of goods by—Construction of lease—Right to maintain replevin.*]—Defendant in writing acknowledged

the receipt by the plaintiff, described as Assistant Manager of the Howe Machine Company, of a sewing machine, on hire for nine months at \$5 a month in advance. He agreed to pay \$45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessors to be in jeopardy, the plaintiff or the company might resume possession of it; and the defendant waived all right of action for trespass, damages, or replevin by reason of any action taken by the plaintiff or the company in resuming such possession.

The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the company, a foreign corporation; and had no property in it except as their agent.

Held, reversing the judgment of the County Court, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard v. Hunter*. 316.

2. *Replevin—Justification under—By-law as to impounding animals—General allegation of performance.*]—In replevin for a mare defendant justified under a by-law of the township, enacting that the poundkeeper should impound any horse for unlawfully running at large, &c., delivered to him for that purpose by any person resident within the township; and that the person distraining should deliver to him at the same time duplicate written statements of his demand against the owner, and, if required by the

poundkeeper, a written agreement with a surety to pay all costs in case the distress should prove illegal, &c., The plea alleged that the mare being taken while at large and doing damage in the township "was duly impounded by a lawfully authorized poundkeeper of the said township," &c., and thereupon all proceedings were lawfully had, all steps taken, notices given, and times elapsed necessary to enable the poundkeeper to sell said mare, &c.

Held, on demurrer, plea bad, for not alleging that the mare was delivered to the poundkeeper by a resident of the township; and that this allegation was not supplied by the general averment that all proceedings were had, &c., which applied only to what took place after the impounding.

Held, also, that the other requisites of the by-law, as to the statement of demand, the written agreement, and notices of sale, &c., were covered by the general allegation. *Rourke v. Mosey*, 546.

RIPARIAN PROPRIETORS.

See WATERS AND WATER-COURSES.

SALE OF GOODS.

1. *Contract by telegrams.*]—Defendant, living at St. Marys, on the 24th of September, 1873, telegraphed to the plaintiff at Forest: "Can you ship three cars Treadwell wheat this month at \$1.20, Reply." On the same day the plaintiff answered: "Will accept your offer, three cars Treadwell, one dollar twenty." On the 25th defendant enclosed a shipping bill to plaintiff, asking him to ship the

wheat as soon as possible. This bill was a printed form in use on the Grand Trunk Railway, filled up for the three cars, addressing them to the Royal Canadian Bank, Montreal. On the next day, hearing that the railway company had been inserting the words at "owner's risk of delay" in their shipping bills, the defendant telegraphed to the plaintiff that he could not take the wheat if the plaintiff allowed these words to be put in. The agent of the railway, however, insisted on inserting these words in the bill of lading, and the plaintiff sent the wheat forward, and drew upon the defendant with the bill of lading attached to the draft, which the defendant refused to accept, and the wheat was sold by the bank. The plaintiff thereupon sued for goods bargained and sold.

Held, that the two telegrams of the 24th and the letter of the 25th of September did not form a binding contract; that the terms of the shipping note were to be considered as part of the bargain; and that the plaintiff therefore could not recover.

Willing v. Currie, 46.

2. *Warranty—Action for price—Evidence.*]—The plaintiff, the agent for an English firm, sold a number of files to defendants, to be paid for by a note at six months, and received from them an order, "Please ship," &c., describing the different sizes required, and the price. A subsequent order was given, as a recapitulation of the previous order. Neither contained any warranty, but it appeared that a verbal warranty of quality was given at the time of sale that they should be as good as the files made by Jowitt, another maker. They were to be delivered in October fol-

lowing, but did not arrive until about the 1st December; and defendants having in the meantime purchased others, they were not opened for some time, and were not tested until March, when defendants, alleging that they did not fulfil the warranty, refused to pay for them. A correspondence took place, in which the plaintiff offered to take back a portion of the files, of a particular kind, but not the rest; and in May, having written to the plaintiff that they would do so, defendants sent the files to their broker in Montreal for sale. In an action for the price, defendants paid into Court the amount realized by this sale, with the invoice prices of the files which they had used, and set up the breach of warranty as a defence to any further claim. The learned Judge, who tried the case without a jury, found that, admitting the warranty, the defendants took an unreasonable time to test the goods: that the defendants should in reason have returned that portion which the plaintiff offered to take back; that the price realized in Montreal could not, under the circumstances, afford a fair criterion of value, by which to bind the plaintiff; and that in certain respects specified, these files were inferior to those made by Jowitt; and he rendered a verdict for the plaintiff for the price agreed upon.

The Court set aside the verdict, and entered a verdict for the defendants, holding: 1. That evidence of the verbal warranty was admissible, the orders for the goods not containing the whole contract, but being given on the faith of the previous verbal warranty; 2. That the weight of evidence shewed the files not to be first-class, and inferior to those made by Jowitt; 3. That

looking at all the circumstances the delay in testing the files was reasonable; 4. That defendants were not bound to return that portion of the files which the plaintiff was willing to take back; for the contract and order being an entire one, the defendants were entitled to have all the files contracted for, or to reject all; 5. That there being no sufficient evidence to shew the actual value of the files, or that they were worth more than they sold for in Montreal, the plaintiff was not entitled to more than the sum paid into Court. *Gordon v. Waterous et al.*, 321.

See STOPPAGE IN TRANSITU.

SALE OF LAND FOR TAXES.

29 Vic., ch. 24, sec 57—Retrospective operation of tax sale. Registration of sheriff's deed. Evidence. Defects cured by statutes.

The judgment of the Court of Queen's Bench, 34 U. C. R. 345, affirmed on appeal. *Jones v. Cowden et al.*, 495.

SALE OF LIQUOR.

See LIQUOR, SALE OF.

SCIRE FACIAS.

Corporation — Sci. fa. against shareholders.—The 27-28 Vic., ch. 23, sec. 27, incorporating the defendants, enacts that every shareholder, until his stock has been paid up, shall be liable to the creditors of the company to the amount unpaid thereon; "but shall not be liable to an action therefor by any creditor" until an execution against the company has been returned unsatisfied, &c.

Held that *sci. fa.* would lie by a judgment creditor of the company against a shareholder, though the general practice here is to proceed by action, for a *sci. fa.* is in fact an action. *Gwatkin et al. v. Harrison*, 478.

SET OFF.

See CORPORATION, 1.

SHAREHOLDER IN PUBLIC COMPANY.

Action against by creditors of Co.] See CORPORATION, 2.

Action against for calls.]—See CORPORATION, 4.

Registration of payment of stock by.]—See CORPORATION, 5.

See SCIRE FACIAS.

SHERIFF'S DEEDS.

See SALE OF LAND FOR TAXES.

SHIP.

See CARRIERS.

SLANDER.

See DEFAMATION.

SPECIALTY DEBT.

See CORPORATION, 1.

STAMPS.

See BILLS AND NOTES, 1.

STATUTES.

- British America Act, 1867, secs. 91, 92.]
 —See LIQUOR, SALE OF, 3.
 "English Companies Act, 1862."—See CORPORATION, 1.
 Insolvent Act of 1869, sec. 50.]—See INSOLVENCY, 1.—MORTGAGE.
 Municipal Act, 1866, sec. 243.]—See MUNICIPAL CORPORATIONS, 1.
 C. S. C. ch. 59.]—See INSOLVENCY, 3.
 C. S. C. ch. 63.]—See CORPORATION, 5.
 C. S. C. ch. 66, sec. 48.]—See CORPORATION, 4.
 C. S. U. C. ch. 85.]—See HUSBAND AND WIFE, 1.
 26 Vic. ch. 45.]—See CONTRACT, 2.
 27—28 Vic. ch. 24, sec. 27.]—See SCIRE FACIAS.—CORPORATION, 3.
 27—28 Vic. ch. 28.]—See CORPORATION, 2.
 29 Vic. ch. 17.]—See INSURANCE.
 29 Vic. ch. 24, sec. 57.]—See SALE OF LAND FOR TAXES.
 32—33 Vic. ch. 24, sec. 71 D.]—See CRIMINAL LAW.
 37 Vic. ch. 38, sec. 11 D.]—See DEFAMATION, 1.
 32 Vic. ch. 32, O.]—See LIQUOR, SALE OF, 2.
 34 Vic. ch. 24, O.]—See HUSBAND AND WIFE, 1.
 34 Vic. ch. 30, sec. 15, O.]—See MUNICIPAL CORPORATIONS, 1.
 35 Vic. ch. 53, O.]—See CORPORATION, 4.
 36 Vic. ch. 15, O.]—See HUSBAND AND WIFE, 1.
 36 Vic. ch. 18, O.]—See DEED—HUSBAND AND WIFE, 1.
 37 Vic. ch. 4, O.]—See ELECTION LAW.
 37 Vic. ch. 32, O.]—See LIQUOR, SALE OF, 1, 3.
 37 Vic. ch. 54, O.]—See RAILWAYS AND R. W. Cos. 2.
 37 Vic. ch. 57, O.]—See CORPORATION, 4.

STOCK.

In Public Company—Registration of payment of.]—See CORPORATION, 5.

STOPPAGE IN TRANSITU.

1. *Goods in bond.*]—The goods in question were purchased by M., in Hamilton, from the agent there of

the plaintiffs, who lived in Montreal, at four months' credit. They were delivered by the plaintiffs in bond at the railway station in Montreal consigned to M., and arrived in Hamilton on the 16th of February, 1874, where they were placed in the customs warehouse at the railway company's freight shed. M. was advised on the following day of their arrival there, but allowed them to remain, and no entry was made or duties paid before the 23rd May, when the plaintiffs gave notice of stoppage in transitu, M. having become insolvent. M. had accepted the plaintiffs' draft for the price, due on the 14th June, which they had discounted at the bank, but they took it up at maturity, and produced it at the trial.

Held, that that the transitus was not at an end: that the right to stop existed; and that the plaintiffs therefore were entitled to the goods as against M.'s assignee. *Lewis et al. v. Mason*, 590.

2. *Notice to stop—Goods in bond.*]—Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs.

Held, that the notice to the company was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery. *Ascher v. The Grand Trunk R. W. Co.*, 609.

TAX SALE.

See SALE OF LAND FOR TAXES.

TELEGRAM.

Sale of goods by.]—*See* SALE OF GOODS, 1.

TENANCY AT WILL.

See EJECTMENT, 2.

TRADE FIXTURES.

Right to remove.]—*See* FIXTURES.

TRAVELLER.

See INNKEEPER.

Accident to.]—*See* RAILWAYS AND R. W. COS, 4.

VOTERS' LISTS.

See ELECTION LAW.

WAREHOUSE RECEIPTS.

See INSOLVENCY, 3.

WARRANTY.

See SALE OF GOODS, 2.

WATERS AND WATER-COURSES.

Natural stream diverted into a canal — Riparian rights.]—The plaintiff claimed title under a deed from T. C. to R. F. C. made in 1845, granting a certain parcel of land in the town of Belleville, described, being part of lot 3, in the first concession of Thurlow,

situate on the west bank of the river Moira, "with an equal right to or privilege of the water from the dam conveyed through the canal to the premises aforesaid, he, the said R. F. C., being at all times at an equal expense in altering, repairing, and amending the dam aforesaid, with the others who participate in the benefit thereof," together with all houses, mills, &c., thereon erected. It was admitted that T. C. then owned lot 3, which included the river Moira and the banks on either side, and that he built the dam and made the canal in question before 1845. By this dam the water of the river was turned into the canal, at the foot of which the plaintiff's mill conveyed by said deed was situate. Defendants had a factory, also on the canal, above the plaintiff's mill, and they diverted the water from the canal, to the injury of the plaintiff's mill.

Held, that the plaintiff having his land on the canal, had as appurtenant to his mill the rights of a riparian proprietor; that the law applicable to natural streams was applicable also to the canal, which was a natural flow of water, though in an artificial channel; and a verdict for plaintiff was sustained.

Semble, that the right to the water given by the deed was an equal right with those who then participated in the benefit of the water from the dam; but *quære* as to the meaning of the deed in that respect. *Diamond v. Reddick et al.*, 391.

WORDS.

"*The merits of the case,*" 32-33 *Vic., ch. 24, sec. 71.*]—*See* CRIMINAL LAW.

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